Petition

Office-Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

81-178

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JAMES W. BIRD, A.I.A.,
Petitioner,

vs.

SAMUEL ROTHMAN, JAMES M. ELLIOTT,
THE LAW OFFICES OF SAMUEL ROTHMAN AND
JAMES M. ELLIOTT, and DOES 1 through 10,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To Review the Judgment of the
Supreme Court of the
State of Arizona.

CHARLES D. MAURER, JR.
MAURER, HIGGINBOTHAM &
HARRIS
601 Montgomery Street,
Suite 511
San Francisco,
California 94111
Telephone: (415) 391-6560
Counsel for Petitioner

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 974-2300

QUESTION PRESENTED FOR REVIEW

(1) Is Arizona's law and policy of immunizing attorneys from adverse party negligence suits a denial of equal protection under the Fourteenth Amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
Question presented for review	i
Opinions below	2
Jurisdiction	2
Constitutional provision involved	2
Statement of the case	3
Statement of facts	3
Argument	9
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases

	Page
Biakanja v. Irving, 49 Cal.2d 647 (1958)	10, 14
Dickel v. Nashville Abstract Co., 145 S.W. 896 (1890)	13
Dun Sportswear v. Cagen, 1313 N.Y.S.2d (1954)	13
Fellows v. Superior Court, 166 Cal.Rptr. 274 (1980)	13
Fickett v. Superior Court, 27 Ariz.App. 793	10, 14
Freese v. Lemmon, 210 N.W.2d 576 (1973)	13
Glanzer v. Shepard, 233 N.Y. 236 (1922)	13
Granberg v. Turnham, 166 C.A.2d 390 (1958)	13
Hanna v. Fletcher, 231 F.2d 469 (1969)	13
Hoffman v. Blackman, 241 So.2d 752 (1970)	13
Kent v. Bartlett, 49 Cal.App.3d 724 (1975)	13
Lowe v. Wright, 292 S.W.2d 413 (1956)	13
McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. at 276 (1916)	14
Montijo v. Swift, 219 Cal.App.2d 351 (1963)	13
Morris v. Ortiz, 103 Ariz. 119 (1968)	9
National Housing Industries, Inc. v. E. L. Jones Development Co., 576 P.2d 1374 (Ariz.App. 1978)	9, 10
Norton v. Hines, 49 Cal.App.3d 917, 123 Cal.Rptr. 237 (1975)	11
Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928)	9
Pastorelli v. Associate Engineers Inc., 176 F.Supp. 159 (1959)	13

Table of Authorities Cited

Cases

	Page
Popelka, Allard, McCowan & Jones v. H. Coster, 165 Cal.Rptr. 748 (1980)	13
Rodriguez v. Besser Co., 565 P.2d 1315 (Ariz.App. 1977)	9
Sun 'n Sand, Inc. v. United California Bank, 21 Cal.3d 671 (1978)	13
Tarasoff v. Regents of University of Calif., 27 Cal.3d 425 (1976)	13

Constitution

United States Constitution:

Fourteenth Amendment ..... i, 3, 4

Fourteenth Amendment, Section 1 ..... 2, 3, 8

Statute

28 USC § 1257(3) 2

Other Authorities

C.J.S. Negligence § 95 (1966) 10

Negligence Law Newsletter, Vol. 1, No. 4, p. 4, Ohio State Bar Association, Columbus, Ohio (April 1978) 14

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JAMES W. BIRD, A.I.A.,
Petitioner,

VS.

SAMUEL ROTHMAN, JAMES M. ELLIOTT,
THE LAW OFFICES OF SAMUEL ROTHMAN AND
JAMES M. ELLIOTT, and DOES 1 through 10,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To Review the Judgment of the
Supreme Court of the
State of Arizona

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James W. Bird, A.I.A., by his attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona dated May 5, 1981.

OPINIONS BELOW

The judgment of the Superior Court of the State of Arizona, County of Pima, dated April 17, 1980, in favor of respondents, is printed at pages A-1 to A-3, infra. The Order and Opinion of the Court of Appeals, State of Arizona, Division Two, dated March 19, 1981, is printed at pages B-1 to B-12, infra, and reported at 627 P.2d 1097. Petitioner's Motion for Rehearing was filed March 27, 1981, and is printed at pages C-1 to C-12, infra. The Order of the Court of Appeals dated April 15, 1981, denying Petitioner's motion for rehearing is printed at page D-1, infra. The Petition for Review of the Court of Appeals decision is dated April 20, 1981, and printed at page E-1, infra. The Order of the Supreme Court, State of Arizona, denying the Petition for Review on May 5, 1981, is printed at pages F-1 to F-2, infra.

JURISDICTION

The Supreme Court, State of Arizona, denied review of the opinion of the Court of Appeals, State of Arizona, May 5, 1981. Jurisdiction of this Court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The case involves a claim carried to Arizona's highest court that the Arizona rule immunizing attorneys from adverse party negligence suits is a denial of equal protection under the Fourteenth Amendment to the United States Constitution.

Currently, Arizona attorneys may file groundless negligence suits, naming innocent parties as defendants, but the innocent defendants are prohibited from countersuing the negligent attorneys.

STATEMENT OF FACTS

James Bird is an architect, having practiced his profession for the last 25 years in 14 states, including Arizona, specializing in the design of race tracks. During that period he has been involved in the design of about twenty-six racetracks (RT. January 16, 1980, pp. 64-66).

His first project was in 1953 when he designed the Phoenix Greyhound Park (RT. January 16, 1980, p. 65).

He also designed the Amado Greyhound Park in 1963. At that time children were not allowed at the track (RT. January 16, 1980, p. 93). His design satisfied architectural standards for Arizona (RT. January 16, 1980, p. 92 and RT. January 15, 1980, pp. 130-135).

Thirteen years later, a complaint was filed by Samuel Rothman and James Elliott against American Greyhound Racing, Incorporated, alleging that a glass window was shattered at the Amado Park by a rock thrown by an unknown patron covering the plaintiff, Lucille Allen, with glass (RT. January 15, 1980, pp. 13-14 and Ex. 1).

The complaint was amended, adding James Bird and his wife as defendants alleging that they were negligent in the design of the Amado Greyhound Dog Track. The complaint was verified by Mr. Samuel Rothman (RT. January 15, 1980, p. 17 and Ex. 3). Interestingly, Mr. Rothman later admits he had no specific evidence that a rock was thrown (RT. January 17, 1980, p. 71). James Elliott and Samuel Rothman prepared the complaint on behalf of Ms. Lucille Allen, acting as her attorneys, working jointly on the case (RT. January 15, 1980, p. 23; RT. January 16, 1980, pp. 199-201). Both men are admitted to the practice of law in Arizona (RT. January 16, 1980, p. 182 and RT. January 17, 1980, pp. 81-84). They handled Ms. Allen's case on a contingency fee basis (RT. January 16, 1980, p. 85).

The complaint was amended a second time (RT. January 15, 1980, p. 18 and Ex. 3), whereupon Mr. Richard L. Thompson, attorney for James Bird, filed a motion for more definite statement (RT. January 15, 1980, pp. 19-21 and Ex. 5). Thereafter a third amended complaint was filed by Messrs. Rothman and Elliott naming James Bird and Bennie Gonzales as defendants and incorporating by reference the allegations of the original complaint, the first amended complaint and the second amended complaint.

During the course of representing Mr. Bird, Mr. Thompson asked Mr. Rothman, "[what] is James Bird, a man who designed a race track fifteen years ago, doing in a lawsuit where a person throws a rock through a window?" Mr. Rothman responded: "Mr. Elliott got a hold of a bunch of names of people that had something to do with the construction and design of the racetrack, and we sued them all" (RT. January 15, 1980, pp. 20-22 and Ex. 6).

Since Mr. Thompson could find no facts to evidence negligence by Mr. Bird (RT. January 15, 1980, p. 19), he filed a motion for summary judgment (RT. January 15, 1980, p. 23 and Ex. 8).

At the hearing on the motion for summary judgment, Mr. Elliott was asked by Judge Carruth if he had an affidavit to counter Mr. Bird's. In response, Mr. Elliott could not produce a counter-affidavit and opined that architects were "thicker than thieves" (RT. January 15, 1980, p. 63-64). Mr. Bird's motion for summary judgment was granted (RT. January 15, 1980, p. 64 and Ex. 12).

Summary judgment was also granted in favor of architect Bennie Gonzales (RT. January 17, 1980, p. 48 and Ex. 13). Mr. Rothman admitted he sued Mr. Gonzales despite the fact that Mr. Gonzales only designated the paint scheme and had nothing to do with the construction of the Amado Greyhound Park. Mr. Rothman opposed Mr. Gonzales' motion for summary judgment (RT. January 17, 1980, pp. 44-48). Mr. Rothman is not a qualified engineer or contractor (RT. January 17, 1980, p. 80).

Mr. Rothman admitted he may have handled only one other professional negligence case in his career, usually

referring such cases to someone with expertise (RT. January 16, 1980, p. 212). He didn't consider himself qualified to handle such a case (RT. January 17, 1980, p. 51). He claims he sued Mr. Bird because there was a "possibility" that he had contributed to Ms. Allen's injuries (RT. January 16, 1980, pp. 213-214). Yet Rothman admits that he never knew if the glass specified by Mr. Bird was actually installed (RT. January 17, 1980, p. 49).

During the course of the suit against Mr. Bird, Mr. Rothman never obtained an opinion from an architect that Mr. Bird had been negligent (RT. January 17, 1980, p. 51).

In fact, Mr. James Larsen, an architect practicing and teaching architecture in Arizona (RT. January 15, 1980, pp. 126-127) had previously advised Mr. Elliott that in his opinion Mr. Bird had satisfied architectural standards at Amado Park and a suit against Mr. Bird was "out to lunch" (RT. January 15, 1980, pp. 130-135).

Mr. Rothman admitted that his file contains notes dated May 16, 1977, approximately the same time Mr. Bird filed his motion for summary judgment. The notes are Mr. Elliott's, who related their substance to Mr. Rothman. In part the notes state:

> "look up the building code; research architects, engineers professional responsibilities; mere existence of window and seats does not contribute to plaintiff's injuries; must find architect who will testify and give affidavit concerning installation of glass equals negligence." (RT. January 17, 1980, pp. 62-64).

Mr. Elliott admits Mr. Larsen advised him that Mr. Bird had not deviated from any standard (RT. January 17, 1980, p. 108).

Mr. Elliott did not try to pinpoint Mr. Bird's liability when he sued him. He only looked for facts which would exclude Mr. Bird definitely . . . not finding that, he sued him (RT. January 17, 1980, p. 135). He did not consult an architect before suing Mr. Bird to evaluate the plans and specifications for Amado Greyhound Park (RT. January 17, 1980, pp. 135-136; RT. January 17, 1980, p. 142). He sued the installer of the glass simply on the basis he had installed the glass (RT. January 17, 1980, pp. 136-137). He is unable to say whether he would sue an architect for damages caused by a jet plane flying into a window and shattering the glass (RT. January 17, 1980, p. 148). He acknowledges he would have sued Mr. Bird for failure to erect a shield if Mr. Bird had not specified any glass at all and a rock was thrown injuring Ms. Allen (RT. January 17, 1980, pp. 141-142). To this day Mr. Elliott doesn't even know what glass was installed (RT. January 17, 1980, pp. 150-151).

Mr. Richard Thompson, an Arizona attorney, represented Mr. Bird throughout the underlying case. Additionally, he visited the Amado Park on more than one occasion to evaluate the case. Mr. Jack Cavness is an Arizona attorney. Both Mr. Thompson and Mr. Cavness opined that Messrs. Elliott and Rothman's investigation of the facts and research of the law in this case fell below the standard of care for an attorney in Arizona. Mr. Thompson also opined that seeking a default judgment

as Mr. Elliott had for Mr. Bird's failure to appear for a deposition which Elliott had never noticed is below the standard of practice for Arizona attorneys. The trial court noted that this evidence was irrelevant and immaterial to the issues of malice and probable cause (RT. January 15, 1980, p. 64 and pp. 87-123).

As a consequence of Mr. Elliott and Mr. Rothman's having sued him, Mr. Bird spent approximately $4,482.33 in attorney's fees (RT. January 15, 1980, p. 72; RT. January 16, 1980, p. 67). In addition, he spent about forty hours assisting counsel in his defense. Ordinarily he charges $50 per hour for his time. His partners also assisted. Mr. Bird suffered frustration, anger, loss of sleep, indigestion and headache (RT. January 16, 1980, pp. 67-70).

Subsequently, Mr. Bird countersued attorneys Rothman and Elliott, alleging counts of malicious prosecution, negligence, and abuse of process. Summary judgment was entered by the trial court against Mr. Bird on the negligence count. The Arizona appellate courts upheld, stating, "There can be no liability in negligence for an attorney who allegedly brings a groundless suit against another party."

In the briefs and oral arguments before both the trial court and the appellate courts, petitioner contended that denying him a jury trial on his negligence claim against respondents was a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The brief in opposition to the summary judgment motion is printed at pages G-1 to G-53. See especially pages G-19 and G-20. The opening brief presented to the Arizona Court of Appeals is printed at pages H-1 to H-24, infra.

See especially pages H-15 to H-22. The reply brief presented to the Arizona Court of Appeals is printed at pages I-1 to I-14, infra. See especially page I-10. The brief in support of the motion for re-hearing is printed at pages C-1 to C-12, infra. See especially pages C-11 and C-12. The petition for review by the Arizona Supreme Court is printed at page E-1, infra.

ARGUMENT

Arizona policy and precedent acknowledges the right of Messrs. Elliott and Rothman, under the circumstances of the underlying case, to sue James Bird for negligence in the performance of his professional duties. The duty of Mr. Bird to refrain from creating an unreasonable risk of harm to persons who might foreseeably be injured by his negligence is an expression of Arizona law which is well established. *Morris v. Ortiz*, 103 Ariz. 119 at 121 (1968). Arizona has decided Mr. Bird's duty in the performance of his profession as an architect arises from the balancing of a "multitude of policy considerations" resting on foreseeability. *Morris, supra*, at 121 citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928). See also *Rodriguez v. Besser Co.*, 565 P.2d 1315 at 1321 (Ariz.App. 1977).

In short, if Mr. Bird designed the Amado Park negligently (which he did not), it is foreseeable that patrons of the Park could be injured and Mr. Bird would be held liable regardless of a lack of privity. In fact, a jury would have decided Mr. Bird's fate in the underlying case if counsel had presented evidence of a failure to comply with the applicable standard of architectural practice. *National Housing Industries, Inc. v. E. L. Jones Development Co.*,

576 P.2d 1374 at 1377 (Ariz.App. 1978). See also C.J.S. Negligence § 95 (1966).

On the other hand, the Arizona judiciary has stated unequivocally that Messrs. Elliott and Rothman owed no duty to refrain from injuring Mr. Bird by negligently performing their professional tasks of filing suit. Arizona attorneys may sue whomever they wish, without grounds, and the state courts afford them immunity from a negligence counteraction. *Bird v. Rothman*, 627 P.2d 1099 at 1100 (Ariz.App. 1981). It is blatantly discriminatory for Mr. Bird not to enjoy the same freedom in the practice of his profession as Rothman and Elliott enjoy in theirs.

Articulating the policy considerations involved in a duty analysis, Arizona adopted verbatim the following language from a California Supreme Court decision:

> ". . . the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Fickett v. Superior Court*, 27 Ariz.App. 793 at 795, citing *Biakanja v. Irving*, 49 Cal.2d 647 (1958).

Applying the test of *Biakanja* and *Fickett* to the case at bar compels the conclusion that defendants owed plaintiff a duty of due care in investigating, initiating and continu-

ing their lawsuit against him. Unquestionably their lawsuit was intended to affect Mr. Bird. They were seeking to recover money from him, or at the very least to force him to defend a lawsuit. Foreseeably this could harm him financially, physically, and emotionally, if not professionally. To a certainty, Mr. Bird logically suffered such injury. But for the defendants' actions this never would have happened. In doing so, they violated standards of practice, sought a default without grounds and swore to the truth of matters they did not know to be true. To make these defendants and others similarly situated in the future answerable for such conduct promotes a policy of preventing future harm to innocent victims of spurious litigation.

The principal argument against creating an attorney's duty of care toward adversaries is it will subvert the public policy of favoring free access to the courts. *Norton v. Hines*, 49 Cal.App.3d 917 at 923, 123 Cal.Rptr. 237 at 241 (1975); see also *Lyddon v. Shaw, Hill v. Willmott* and *Spencer v. Burglass, supra.* This ignores the countervailing policy of favoring protection of individuals from involvement in groundless litigation. Creating a duty of reasonableness in these cases would encourage preliminary investigation and research which in turn would improve the quality of the profession and raise the caliber of representation. It would reduce congestion of the court's calendar which could be reflected in the cost of filing and prosecuting lawsuits. It would also reduce the cost of malpractice insurance by placing the premium for failure to investigate on the plaintiff's attorney rather than the innocent professional who is unjustifiably sued. Society would

benefit, since insurance dollars would be funneled toward paying losses rather than paying the cost of defense.

Opponents of the duty also urge that the mere threat of a countersuit for negligence would impair the ability of the attorney to represent his client. In fact, they agree, it creates the potential that an attorney may have a conflict of interests with his client. This conflict is generated, they assert, by the attorney's temptation to blame his client for any wrongdoing and to disclose confidences necessary for self-defense. See Comment, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L.J. 387 at 389 (1978). Such reasoning is shortsighted. If the attorney has done his homework, then his interest and the client's are the same, i.e., to diligently prosecute the case to its conclusion or settlement, whichever occurs first. If the attorney does not share this interest with his client he should not undertake to represent him. To accept the case, believing it lacks probable cause, is a disservice to the client and may constitute malicious prosecution of the defendant if the other elements occur, such as favorable termination.

Perhaps these commentators are suggesting the anxiety level of plaintiffs' attorneys in a "negligence" jurisdiction would be unbearably greater than that of the plaintiffs' attorneys in "malicious prosecution only" jurisdictions.

Those opposing the duty of due care also argue that countersuits for negligence would expose the attorney's work product to discovery, yet we know of no such exception to the work product privilege. Nor do we find any reported case which implies a waiver of this privilege in the event

of a countersuit for negligence. On the contrary, in malicious prosecution cases, the attorney's work product on the underlying case has been held to be privileged despite the fact that the underlying case has terminated. *Popelka, Allard, McCowan & Jones v. H. Coster,* 165 Cal.Rptr. 748 (1980); *Fellows v. Superior Court,* 166 Cal.Rptr. 274 (1980). It appears the opponents of a rule imposing a duty on attorneys to use reasonable care in suing adversaries have created specious arguments in an effort to carve out an immunity for themselves.

These same spokesmen have successfully created a legal duty of due care to third parties in virtually every profession other than law. See e.g.: *Hoffman v. Blackman,* 241 So.2d 752 (1970) and *Freese v. Lemmon,* 210 N.W.2d 576 (1973) [physicians]; *Tarasoff v. Regents of University of Calif.,* 17 C.3d 425 (1976) [psychiatrist]; *Dun Sportswear v. Cogen,* 1313 N.Y.S.2d (1954) [accountants]; *Dickel v. Nashville Abstract Co.,* 145 S.W. 896 (1890) [abstractor]; *Lowe v. Wright,* 292 S.W.2d 413 (1956) [notary]; *Montijo v. Swift,* 219 Cal.App. 351 (1963) [architects]; *Hanna v. Fletcher,* 231 F.2d 469 (1969) and *Pastorelli v. Associate Engineers Inc.,* 176 F.Supp. 159 (1959) [engineers]; *Kent v. Bartlett,* 49 Cal.App.3d 724 (1975) [surveyor]; *Granberg v. Turnham,* 161 C.A.2d 390 (1958) [real estate broker]; *Sun & Sand, Inc. v. United California Bank,* 21 C.3d 671 (1978) [bank]; *Glanzer v. Shepard,* 233 N.Y. 236 (1922) [weighmaster]. In sum, attorneys are unwilling to practice what they preach, i.e., third party liability for negligence.

In light of the relaxation of privity requirements in these areas and others, such as products cases (see e.g. *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. at 276 (1916)), it is an obvious discrimination to give lawyers preferred treatment. The test of duty outlined in *Biakanja* and *Fickett, supra,* supersedes any argument favoring privity as a prerequisite to duty.

As one analyst puts it:

> "No profession uses balancing tests more skillfully than ours, and there is no reason to believe that the courts cannot find the proper balance between compensating those who deserve it on the one hand and protecting the freedom of the attorney to prosecute his client's case diligently, zealously and effectively on the other hand." Negligence Law Newsletter, Vol. 1, No. 4, p. 4, Ohio State Bar Association, Columbus, Ohio (April 1978)

In light of the expansion of third party liability for all professionals, the Arizona public policy test for duty espoused in *Fickett* should be strictly and uniformly applied.

To carve from *Fickett* an exception for attorneys on the grounds stated in the *Bird* opinion is a denial of equal protection of law under the Fourteenth Amendment.

The expressed State interest in protecting attorneys from negligence claims must apply equally to others or fail to satisfy established constitutional tests of equal protection.

CONCLUSION

Wherefore, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Arizona in *Bird v. Rothman.* In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed and that the case be remanded for trial on the negligence claim.

Respectfully submitted,

CHARLES D. MAURER, JR.
MAURER, HIGGINBOTHAM & HARRIS
Counsel for Petitioner

(Appendices follow)

APPENDIX

Appendix A

Law Offices
Fish, Briney, Duffield, Miller, Young & Adamson, P.C.
Suite 711 Transamerica Building
Tucson, Arizona 85701
Area (602) 792-1181

Richard Briney
Attorneys for Defendants

In the Superior Court of the State of Arizona
in and for the County of Pima

No. 173607

James W. Bird, A.I.A.,
Plaintiff,

vs.

Samuel Rothman, et al.,
Defendants.

[Filed April 17, 1980]

JUDGMENT

This action came on for trial before the Court and a jury on January 15, 1980, the Honorable John P. Collins, Superior Court Judge, presiding, and the Court having concluded, as a matter of law, that the plaintiff has failed to establish a lack of probable cause by the defendants Samuel Rothman and James M. Elliott in instituting and continuing that certain lawsuit heretofore filed and pending in the Superior Court, State of Arizona, County of

Pima, bearing Civil No. 159735, entitled "Lucille Allen v. American Greyhound Racing, Inc., et al.", and the Court having concluded as a matter of law that probable cause did exist, and the Court having concluded that there is insufficient evidence to submit to the jury the question of the state of mind of the defendants Samuel Rothman and James M. Elliott, and the Court therefore having concluded as a matter of law that the said defendants did have an honest actual belief in the merits of the aforesaid Lucille Allen lawsuit against James W. Bird, and the Court having concluded that if it had permitted expert testimony from Attorneys Richard L. Thompson and Jack Cavness for the plaintiff and Attorneys D. B. Udall and Stanley G. Feldman for the defendants, as to whether or not, in their investigation of the facts involved, both prior to and during the pendency of the Lucille Allen lawsuit against James W. Bird, the defendants, Samuel Rothman and James M. Elliott, complied with the standard of care applicable to them as reasonably prudent attorneys, the Court would have violated the ruling of the Supreme Court of Arizona (January 19, 1976), *Carroll v. Kalar,* 112 Ariz. 595, 545 P.2d 411, which said ruling prohibits the admissibility of opinion evidence by lawyers on the question of probable cause, and the Court having directed a verdict in favor of the defendants as to the FIRST CAUSE OF ACTION (MALICIOUS PROSECUTION) contained in the plaintiff's Complaint, and the Court having heretofore on August 8, 1979 entered Judgment in favor of the defendants and against the plaintiff on each the SECOND CAUSE OF ACTION (NEGLIGENCE) and the THIRD CAUSE OF ACTION (ABUSE OF PROCESS),

NOW THEREFORE it is hereby ORDERED, ADJUDGED AND DECREED that the defendants Samuel Rothman and James M. Elliott have Judgment in their favor and against the plaintiff, James W. Bird, on the FIRST CAUSE OF ACTION (MALICIOUS PROSECUTION) contained in the Complaint on file herein, that said FIRST CAUSE OF ACTION be dismissed with prejudice and that the defendants have and recover their costs.

It is further ORDERED that the Clerk of the Superior Court have judgment against the plaintiff in the sum of $444.00 as and for jury fees.

DONE IN OPEN COURT this 17th day of April, 1980.

/s/ JOHN P. COLLINS

Judge/Court Commissioner of
the Superior Court

Appendix B

In the Court of Appeals
State of Arizona

Division Two

2 CA-CIV 3763
(Pima County Superior Court
Cause No. 173607)

James W. Bird, A.I.A.,
Plaintiff/Appellant,

v.

Samuel Rothman, an individual, James M. Elliott, an individual, and the Law Offices of Samuel Rothman and James M. Elliott, a partnership and Does 1 through 10,
Defendants/Appellees.

[Filed March 19, 1981]

ORDER

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Opinion.

It is Ordered that the Opinion be filed by the Clerk, and, under Arizona Rules of Civil Appellate Procedure, Rule 22(a), fifteen days are allowed from this date to file a Motion for Rehearing.

It Is Further Ordered that a copy of this Order, together with a copy of the Opinion, be sent to each party appearing or the attorney for such party and to The Honorable Gilbert Veliz, Judge, and to The Honorable John P. Collins, former Judge, and to The Honorable William E. Druke, Presiding Judge.

Dated: March 19, 1981.

/s/ James D. Hathaway

James D. Hathaway,
Chief Judge.

Copies mailed as directed this
19th day of March, 1981.

/s/ Elizabeth Urwin Fritz

Elizabeth Urwin Fritz, Clerk.

In the Court of Appeals
State of Arizona

Division Two

2 CA-CIV 3763

James W. Bird, A.I.A.,
Plaintiff/Appellant,

v.

Samuel Rothman, an individual, James M. Elliott, an individual, and the Law Offices of Samuel Rothman and James M. Elliott, a partnership and Does 1 through 10,
Defendants/Appellees.

Appeal from the Superior Court of Pima County
Cause No. 173607
Honorable Gilbert Veliz, Judge
Honorable John P. Collins, Former Judge

Affirmed

[Filed March 19, 1981]

Opinion

In this case we are asked to review the trial court's actions in a malicious prosecution, abuse of process, and negligence suit which terminated in favor of appellees, two Tucson attorneys, on all three counts. Appellant challenges summary judgment on the abuse of process and

negligence counts, and a directed verdict for appellees on the malicious prosecution count at trial.

In February 1976, appellees, representing a woman who was injured at Amado Greyhound Park when the grandstand glass was shattered by a rock, filed a tort action which initially named only the park as defendant. After additional investigation, an amended complaint was filed adding appellant Bird as a defendant. Appellant is an architect who specializes in the design of race tracks. He designed Amado Greyhound Park in 1963. After a motion for more definite statement by appellant and additional amended complaints were filed, appellant filed a motion for summary judgment. The motion was granted and judgment was entered dismissing appellant from the suit on September 29, 1977.

On May 1, 1978, appellant filed this action, alleging that appellees acted maliciously and without probable cause in bringing the prior action against him, that they were negligent in failing to investigate the facts and the law before suit, and that they were guilty of abuse of process. Appellees' motion for summary judgment on the negligence and abuse of process counts was granted on July 19, 1979.[1] The remaining malicious prosecution count was tried to a jury, and after both parties had rested, a directed verdict was entered for appellees. Appellant appeals from a final judgment in favor of appellees on all three counts. We will address the issues disposed of by summary judgment first.

---

[1]The Hon. Gilbert Veliz ruled on the motion for summary judgment, while the Hon. John P. Collins (former judge) sat at trial.

NEGLIGENCE

Appellant states the negligence issue as follows: "Are attorneys in Arizona immune from liability to adverse parties for negligently instituting or continuing groundless lawsuits?" The basic issue is whether an attorney owes a duty to a party opposing his client in an action arising out of his professional duties in the absence of fraud or collusion. Appellant contends that public policy compels a conclusion that attorneys should be liable in simple negligence to an adverse party for filing a groundless lawsuit. They argue such third party liability exists in other professions, and that there are no reasons why attorneys should receive preferential treatment by the courts.

The issue of an attorney's liability to an adverse party in negligence was recently addressed in Lewis v. Swenson, ...Ariz....., 617 P.2d 69 (App. 1980). There, the court applied our earlier opinion in Fickett v. Superior Court, 27 Ariz.App. 793, 558 P.2d 988 (1976), in holding that an attorney was not liable for negligence for failing to warn an expert witness not to mention insurance during his testimony. The adverse party had brought an action against the defendant attorney alleging damages as a result of the mistrial which was granted after insurance was mentioned while defendant was examining the expert witness. The court applied the test adopted in *Fickett* to resolve the issue of whether the attorney owed a duty to the adverse party under the circumstances:

> " . . . the bette. view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors,

among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958); (other citations omitted)." 27 Ariz.App. at 795, 558 P.2d at 990.[2]

As cited in the above quotation, the *Biakanja* case in California was the first to apply the balancing concept to determining liability in negligence to a third party. The California Court of Appeals was called upon to apply the test to the same issue as the one presently before us in Norton v. Hines, 49 Cal.App.3d 917, 123 Cal.Rptr. 237 (1975). We have no hesitancy in agreeing with the conclusion in *Norton*, and the overwhelming majority view in other jurisdictions, that malicious prosecution is the proper cause of action under the circumstances of this case, and that negligence is an improper standard upon which to base liability of an attorney to an adverse party. The balance between freedom of access to the courts and compensating a defendant from unwarranted prosecution and discouraging unmeritorious litigation must be struck in favor of allowing the attorney, as an officer of the court, the freedom to present his case as vigorously as the rules of law and professional ethics will permit. *See also,* Weaver v. Superior Court, 95 Cal.App.3d 166, 156 Cal. Rptr. 745 (1979); Lyddon v. Shaw, 56 Ill.App.3d 815, 372

---

[2]*See* Note, 19 Ariz. L. Rev. 653 (1977).

N.E.2d 685 (1978); Petrou v. Hale, 43 N.C.App. 655, 260 S.E.2d 130 (1979); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978). Our courts must be held open to litigating parties without fear of subsequent prosecution for calling upon the court to decide a contested issue. The lawyer's role in this process is unlike that of other professionals. His relationship with the opposing party is by its very nature adverse, not mutually beneficial. The party who is forced to defend a groundless lawsuit may institute disciplinary proceedings against the offending lawyer, as well as bringing a malicious prosecution action.

Since we hold that there can be no liability in negligence for an attorney who allegedly brings a groundless suit against another party, the summary judgment on this count was properly granted.

ABUSE OF PROCESS

The gist of appellant's abuse of process claim is that there was some evidence that appellees brought appellant into the underlying lawsuit in order to force a settlement. Appellant contends that instituting an action to force several defendants to pool their funds and pay plaintiff his demand rather than undergo the expense of trial is evidence of an ulterior, improper purpose precluding summary judgment on this count.

The essential elements of the tort of abuse of process are an ulterior purpose *and* a wilful act in the use of judicial process not proper in the regular conduct of the proceeding. Joseph v. Markovitz, 27 Ariz.App. 122, 551 P.2d 571 (1976); Rondelli v. County of Pima, 120 Ariz. 483, 586 P.2d 1295 (App. 1978). Even assuming a factual

issue exists in regard to an ulterior purpose, there was no evidence of subsequent misuse of process after it was lawfully issued. An ulterior purpose alone cannot constitute abuse of process. There was no proof of an improper use of judicial process here, as the purpose of settlement is includable in the goals of proper process. Bickel v. Mackie, 447 F.Supp. 1376 (N.D. Iowa 1978), aff'd 590 F.2d 341 (8th Cir. 1978); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ.App. 1978); Petrou v. Hale, supra; Brody v. Ruby, supra. The summary judgment on the abuse of process count was properly granted.

MALICIOUS PROSECUTION

In determining the propriety of a directed verdict in a malicious prosecution case, the evidence and all inferences therefrom must be viewed in the light most favorable to the opposing party. LaSalle National Bank v. 222 East Chestnut Street Corp., 353 F.2d 680 (7th Cir. 1965), cert. den. 384 U.S. 938 (1966). After three days of testimony, the trial court granted a directed verdict for appellees on this count because it concluded as a matter of law that probable cause existed to bring the underlying action against appellant. Our review of the record indicates that the trial judge properly understood his role in determining probable cause, and that he correctly applied the applicable law to the facts before him.

The elements of malicious prosecution include (1) the institution of a proceeding, (2) actuated by malice, (3) without probable cause by the defendant in this action, (4) which terminated in the plaintiff's favor, and (5) caused him damages. The failure to establish lack of

probable cause is a complete defense. Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976); Cullison v. City of Peoria, 120 Ariz. 165, 584 P.2d 1156 (1978). Whether the facts in a case are sufficient to constitute probable cause is a question of law for the court to be determined by a reasonable person test: Upon the appearances presented to the defendant, would a reasonably prudent person have instituted or continued the proceeding? Carroll v. Kalar, supra; McClinton v. Rice, 76 Ariz. 358, 265 P.2d 425 (1953).

The proper role of the trial judge in determining whether probable cause existed created much confusion below. Appellant contended there and on appeal that based on the facts in evidence, the jury was entitled to decide if appellees honestly believed in their case and whether they conducted a reasonable investigation of the facts and the law before filing suit. Then, and only then, appellant argues, can the court decide the issue of probable cause. Appellant offered into evidence the opinions of two Arizona attorneys, who had reviewed appellees' files in the underlying action, as to whether appellees' investigation and research were reasonable. The trial court refused to admit such opinion evidence from either party. Appellant argues that only qualified attorneys, not the trial court, could determine if appellees' efforts were reasonable. Finally, appellant contends that the issue of malice should have gone to the jury.

These arguments ignore what has been described as the "well developed and clear" law in this state as set forth in Carroll v. Kalar, supra. All issues of a party's reasonable belief and prudence in bringing an action are to be decided

by the court. The only function of the jury in the determination of probable cause is to determine the actual facts of what the prosecuting party or attorneys performed in the way of investigation and research. The record herein clearly shows no conflict as to what research and investigation appellees had undertaken before bringing appellant into the lawsuit. The jury, then, had no role in the determination of probable cause. Murphy v. Russell, 40 Ariz. 109, 9 P.2d 1020 (1932), cited by appellant, is entirely consistent with this conclusion. The methods proposed in that case to submit a malicious prosecution probable cause issue to the jury apply only if the underlying facts regarding the investigation and preparedness of the prosecuting party are in conflict.

> "Whether a given state of facts constitutes probable cause is always a question of law to be determined by the court, and it cannot relieve itself of this burden by casting it upon the jury. (citations omitted) The only function of the jury in this respect is to determine what the actual facts were. If, therefore, taking the evidence in the strongest manner in favor of plaintiff, the court is of the opinion that as a matter of law the facts so proved constitute probable cause for the prosecution, it is its duty to instruct the jury to return a verdict in favor of the defendant. (citations omitted) If, however, the evidence is conflicting, so that on one conclusion as to the facts drawn therefrom probable cause exists, while from another it does not, it is then for the jury to determine the true state of facts and to apply the law as laid down by the court to those facts. (citations omitted)." 40 Ariz. at 112, 9 P.2d at 1021.

In accordance with this rule, the expression of opinions by other attorneys as to whether reasonable and prudent persons would have instituted or continued the proceeding are wholly immaterial to the decision in the case and were correctly not admitted below. Carroll v. Kalar, supra.

The evidence before the trial court showed without contradiction that appellees had probable cause to bring the underlying suit against appellant. Mr. Rothman testified he spent between 25 to 30 hours researching and investigating various theories of how the accident could have occurred before filing suit, and knew that Mr. Elliott had spent a similar amount of time in the case. The attorneys were especially concerned with the design and materials used in the construction of the grandstand, and had researched architect's liability for failing to provide a safe place for spectators. They were also concerned with the possibility that an "empty chair defense" would be employed by the other defendants, blaming the accident on a party not brought into the action. Mr. Rothman contacted at least one architect regarding proper standards of care before the suit was filed. Mr. Elliott testified that based on statements from witnesses to the accident, he felt they could proceed on a legal theory that would allow them to present lay testimony as to a substantial safety hazard at the track, and not to rely on expert testimony for their suit against appellant.

Since the issue of probable cause was decided in appellees' favor, and probable cause constitutes a complete defense to the action, there was no need to submit the issue of malice to the jury.

In summary, despite appellant's arguments that negligence suits, such as the underlying suit in this action, against architects and engineers have a significant impact on malpractice liability insurance rates and serve to impugn the reputation of conscientious professionals, we are persuaded that in the absence of proof of malicious prosecution on the part of the injured party or his attorney, the interest of freedom of access to our courts compels the conclusions we have reached. The record supports the trial court's finding of probable cause in the malicious prosecution action, and the negligence and abuse of process counts were properly dismissed as a matter of law.

Affirmed.

JAMES D. HATHAWAY,
Chief Judge

CONCURRING:

LAWRENCE HOWARD, Judge

BEN C. BIRDSALL, Judge

Appendix C

In the Court of Appeals
State of Arizona

Division Two

No. 2CA-CIV 3763
(Pima County Superior Court
Cause No. 173607)

James W. Bird, A.I.A.,
Plaintiff/Appellant,

vs.

Samuel Rothman, James M. Elliott, the Law Offices of Samuel Rothman and James M. Elliott, and Does 1 through 10,
Defendants/Appellees.

[Filed March 27, 1981]

MOTION FOR REHEARING

Appellant James Bird requests a rehearing of the above-entitled matter pursuant to ARCAP 22(a) for the following reasons:

A. MALICIOUS PROSECUTION

1. THE COURT HAS ERRONEOUSLY INTERPRETED THE SUPREME COURT'S DECISION IN CARROLL V. KALAR.

(a) In the last paragraph of page 5 of its opinion, the court stated "All issues of a party's reasonable belief and prudence in bringing an action are to be decided by the

court". This is in contravention of the Supreme Court's rule in *Carroll v. Kalar*, 112 Ariz. 595 (1976). At page 598, the Supreme Court stated:

> "If from one set of facts the conclusion can be inferred that probable cause exists, and from another that it does not, it is for the jury to determine the true state of facts."

An attorney's honest and reasonable belief that his claim is tenable is one of the elements of probable cause. As stated in *Carroll*,

> "This state of mind has been held to ordinarily be a question for the jury"

Absent a confession, the state of mind of a defendant can be proven only through circumstantial evidence. Such evidence was offered to show that the defendants' state of mind was improper, unreasonable, and malicious. In light of this evidence, the jury should properly have resolved the question of the defendants' state of mind.

(b) Before probable cause can be established, an attorney must conduct a reasonable investigation of the facts and an industrious search of the law.

> "An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious research of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried [citations]. The test is twofold. The attorney must entertain a subjective belief that the claim merits litigation and that belief must satisfy an objective standard." *Tool Research & Engineering Corp. v. Henigson*, 46 C.A.3d 675 at 683 (1975).

Expert testimony on the degree of investigation and research does not constitute an opinion on the ultimate issue of probable cause and is properly admissible in a malicious prosecution action. The court misstates appellant's position, wherein they say: "Appellant argues that *only* qualified attorneys, not the trial court, could determine if appellee's efforts were reasonable" (emphasis added). The reasonableness of appellee's investigation is a question of fact for the jury. Although a trial judge may be able to decide this issue, it is properly resolved by the jury.

Expert witnesses are distinguished from lay witnesses by the education, experience, and training which enables them to render opinions in addition to testifying as to facts. In a malicious prosecution action concerning a specialized area of law (architects' and engineers' professional liability), expert testimony regarding the reasonableness of research and investigation can be provided only by an attorney with expertise on the subject matter. At the very least, attorneys who are privy to the court file, the defendants' entire file, the discovery proceedings, the pleadings and motions, negotiations, telephone discussions, facts, and circumstances of the underlying case should be allowed to provide the court with the benefit of their opinion regarding the defendants' knowledge of the case, research of the law, and investigation of the facts.

Moreover, how can fact finders determine if the investigation and research of counsel in a particular case was reasonable unless they know the standard practice for investigation and research in the type of case being considered? The defendant may have acted in a specialized

area of the law and thus be held to a higher standard. *Wright v. Williams*, 47 C.A.3d 802 (1975); see also *Horne v. Peckham*, 97 Cal.App.3d 404, 158 Cal.Rptr. 714 (1979).

2. THE COURT HAS ERRONEOUSLY FAILED TO REQUIRE THE TRIAL COURT TO FOLLOW THE SUPREME COURT RULE FOR DETERMINING PROBABLE CAUSE AS STATED IN *MURPHY V. RUSSELL.*

(a) Although the Supreme Court has held in *Carroll, supra*, that probable cause is a question of law for the court, they have continued to stress the role of the jury in deciding the issues of fact which form the basis for the existence or absence of probable cause. Since so many of the underpinnings of probable cause are questions of fact, the proper procedure for resolving the issue of probable cause was stated in *Murphy v. Russell* by the Supreme Court and has been circumvented in the case at bar:

> "There are two methods whereby the court and jury can respectively discharge their proper functions in this respect. The first, and perhaps the surer, is by the court submitting a special verdict to the jury and then applying the law to the facts so found. [citations] The second, and probably the commoner, method is for the court, by means of a hypothetical instruction, to group the facts which the evidence tends to prove, and then instruct the jury that, if they find one set of facts to have been established, they should find that there is probable cause, while, if they find the other, they should find there is not. [citations]" *Murphy v. Russell*, 9 P.2d 1020 at 1021, 1022 (1932)

The trial court did not follow this procedure and the appellate court should have ruled this case be remanded and the method for determining probable cause established by the Supreme Court be carried out at the trial level.

3. THE COURT ERRONEOUSLY CONCLUDED THAT "THE EVIDENCE BEFORE THE TRIAL COURT SHOWED *WITHOUT CONTRADICTION* THAT APPELLEES HAD PROBABLE CAUSE TO BRING THE UNDERLYING SUIT AGAINST APPELLANT".

(a) Defendant Rothman verified a complaint alleging that a glass window was shattered at the Amado Park by a rock thrown by an unknown patron, covering the plaintiff, Lucille Allen, with glass. In his testimony at trial, Mr. Rothman *contradicted himself* by admitting that he had no specific evidence that a rock was thrown. Since Mr. Rothman has given contradictory sworn statements, the jury should be given the opportunity to decide the true facts. They may also reject his testimony in its entirety. Mr. Rothman's credibility is a question of fact for jury determination.

Mr. Rothman also testified at trial that he may have handled only one other professional negligence case in his career, usually referring such cases to someone with expertise. He did not consider himself qualified to handle such a case. If Mr. Rothman, by his own admission, is unqualified to determine whether a tenable claim existed against Mr. Bird, how can his testimony be considered evidence to support a claim of probable cause? The jury should have decided the honesty and reasonableness of defendants' belief in their claim against Mr. Bird.

(b) Defendants' self-serving testimony does not conclusively establish the honesty and reasonableness of their conduct. Mr. Elliott had been advised by Mr. James Larson, an architect practicing and teaching architecture in Arizona, that in his opinion Mr. Bird had satisfied architectural standards and a suit against him was "out to lunch". Absent any other opinion from an expert source, how could Mr. Elliott honestly believe his case had merit?

(1) File notes reflect that preliminary research of the law was not conducted by Mr. Rothman and Mr. Elliott until the time of Mr. Bird's motion for summary judgment. This is not the industrious research required as a prerequisite to a finding of probable cause.

(2) Mr. Rothman admitted that he never knew if the glass specified by Mr. Bird was actually installed.

(3) Defendants never obtained an opinion from an architect that Mr. Bird had been negligent.

(4) Mr. Elliott did not try to pinpoint Mr. Bird's liability when he sued him; he only looked for facts which would exclude Mr. Bird definitely. He sued the installer of the glass simply for installing the glass.

(5) Mr. Rothman admitted suing another architect, Benny Gonzales, despite the fact that Mr. Gonzales only designated the color of paint at the Park. Mr. Rothman admits he is not a qualified engineer or contractor. He claims he sued Mr. Bird because there was a "possibility" that he had contributed to Ms. Allen's injuries.

(6) When Mr. Rothman was asked by Mr. Bird's attorney "What is James Bird, a man who designed a race-

track fifteen years ago, doing in a lawsuit where a person throws a rock through a window?" Mr. Rothman responded, "Mr. Elliott got ahold of a bunch of names of people that had something to do with the construction and design of the racetrack, and we sued them all."

(7) At the hearing on Mr. Bird's motion for summary judgment, Mr. Elliott was unable to produce a counter-affidavit and remarked to the trial court that architects were "thicker than thieves." At the same time Mr. Elliott was asking for entry of a default judgment against Mr. Bird on grounds that Mr. Bird had failed to appear for a deposition. In fact, Mr. Elliott had never noticed Mr. Bird's deposition.

(8) Mr. Elliott is unable to say whether he would sue an architect for damages caused by a jet plane flying into a window and shattering the glass. He acknowledges he would have sued Mr. Bird for failure to erect a shield if Mr. Bird had not specified any glass at all and a rock had been thrown, injuring Ms. Allen.

All of these facts, which were introduced into evidence at the trial, clearly indicate that the defendants had not investigated their case or researched the law until the time of appellant's motion for summary judgment. Moreover, they could not honestly believe they had a tenable claim since they had not conducted an investigation and were admittedly unqualified to express an opinion on Mr. Bird's liability. When expert sources (Mr. Larson) were ultimately contacted, defendants were advised that the case was without merit. Nevertheless, they proceeded to keep Mr. Bird in the suit and, in fact, sought a default judgment

without grounds. All of these facts serve to establish the lack of probable cause for suing Mr. Bird. The self-serving testimony of defendants at trial that they believed Mr. Bird was in some way responsible for Ms. Allen's injuries is insufficient to establish probable cause for the filing of a suit. Appellees' credibility is in question and the facts contradict their beliefs. In sum, their motives and state of mind were properly resolvable by the jury.

B. ABUSE OF PROCESS

1. THE COURT ERRONEOUSLY CONCLUDED "THERE WAS NO EVIDENCE OF SUBSEQUENT MISUSE OF PROCESS AFTER IT WAS LAWFULLY ISSUED".

(a) The court opines that, assuming defendants had an ulterior motive in suing Mr. Bird, their objective was settlement, which is properly includable as a goal in the process of litigation and not a misuse of process. As stated on page 3 of the opinion, "An ulterior purpose alone does not constitute abuse of process. There was no proof of an improper use of judicial process here, as the purpose of settlement is includable in the goals of proper process". In truth, settlement is properly includable in the goal of civil proceedings only when founded on proper motives and based upon a willingness to compromise the merits of a claim. As stated in the Restatement of Torts 2d, Section 676, Comment C:

> "A fourth [form of wrongful civil proceedings] arises when the proceedings are initiated for the purpose of forcing a settlement and has no relation to the merits of the claim. This occurs, for example, when a plaintiff,

> knowing that there is no real chance of successful prosecution of a claim, brings a 'nuisance suit' upon it for the purpose of forcing the defendant to pay a sum of money in order to avoid the financial and other burdens that a defense against it would put upon him."

Again, the defendants' motives are in issue. Plaintiff offered evidence that the defendants simply sued everyone connected with the design and construction of the park and could not honestly and reasonably believe they had a tenable claim (see facts cited above). If Rothman's and Elliott's desire to settle was based solely on the nuisance value of the case, they have abused the process of summons and complaint against Mr. Bird.

C. NEGLIGENCE

1. THE COURT REJECTED ARIZONA PRECEDENT AND SOUND PUBLIC POLICY BY CONCLUDING THERE CAN BE NO LIABILITY IN NEGLIGENCE FOR AN ATTORNEY WHO FILES AND PROSECUTES A GROUNDLESS LAWSUIT.

(a) Page 4 of the court's opinion reads: ". . . there can be no liability in negligence for an attorney who allegedly brings a groundless suit against another party." Such a rule encourages the filing of frivolous suits, congests the court, increases the cost of insurance, creates contempt for the judiciary, denigrates the legal profession, and generally disserves the public. This is not the public policy of Arizona. The attorney's freedom to sue whomever he wishes should not be absolute. More sacred rights, such as the First Amendment freedom of speech, are not absolute and society functions better with such a rule because it

protects against defamatory statements and riots. In striking a balance between freedom of access to the courts and compensating a defendant from unwarranted prosecution and discouraging unmeritorious litigation, a rule requiring attorneys to be reasonable better serves the public of Arizona than a rule allowing them unfettered discretion to sue whomever they please.

(b) In *Fickett v. Superior Court*, 27 Ariz.App. 793, 558 P.2d 988 (1976), this court articulated the following factors to be determined in deciding whether an attorney owes a duty to a third person not in privity:

1. The extent to which the transaction was intended to affect the plaintiff;

2. The foreseeability of harm to him;

3. The degree of certainty that the plaintiff suffered injury;

4. The closeness of the connection between the defendant's conduct and the injury suffered;

5. The moral blame attached to the defendant's conduct;

6. The policy of preventing future harm.

Applying these factors to the facts of the instant case leads to one conclusion: Elliott's and Rothman's conduct was clearly intended to affect Mr. Bird . . . they sued him; it was foreseeable that if they acted irresponsibly, they would harm Mr. Bird; Mr. Bird clearly suffered injury; but for Elliott's and Rothman's conduct, Mr. Bird would not have suffered the damages he did; it was morally wrong to sue Mr. Bird arguing "architects are thicker than

thieves" and alleging he simply had something to do with the design of the Amado Park; holding Elliott and Rothman accountable for their actions will discourage attorneys in the future from similar irresponsible acts.

The *Fickett* rule clearly establishes that the appellees in the instant case owed a duty to Mr. Bird. A jury should be allowed to decide if this duty was breached.

2. IN LIMITING MR. BIRD'S RECOURSE TO INSTITUTION OF DISCIPLINARY PROCEEDINGS, THE COURT HAS ESTABLSHED AN IRRATIONAL DOUBLE STANDARD WHICH VIOLATES THE CONSTITUTIONAL RIGHTS OF MR. BIRD TO RECEIVE EQUAL PROTECTION UNDER THE LAW, DUE PROCESS, AND A JURY TRIAL.

(a) The court's opinion espouses a rule which gives preferential treatment to attorneys. Third-party liability is recognized in law for other professions and laymen. The court erroneously justifies a rule exempting litigation attorneys from third-party liability on grounds that "The lawyer's role in the process is unlike that of other professionals. His relationship with the opposing party is by its very nature adverse, not mutually beneficial." (See pages 3 and 4 of the opinion.) The psychiatrist who must decide whether to allow his patient to re-enter society as part of the rehabilitation process can hardly be said to be "mutually interested" in the welfare of the heirs of the victim the patient intends to kill, yet the doctor is liable to them. Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976). Architects, engineers, physicians, and other professionals have a duty to their clients and patients

the same as attorneys and their interest in serving their clients is rarely, if ever, "mutually beneficial" to a third party. See Montijo v. Swift, 219 Cal.App.2d 351 and Molien v. Kaiser, 167 Cal.Rptr. 831 (1980); also see additional authorities cited at pages 16 and 17 of appellant's Opening Brief.

Allowing attorneys to sue Mr. Bird for negligence in his profession while disallowing Mr. Bird the right to sue attorneys for negligence in their profession is an unconstitutional paradox which denies Mr. Bird the safeguards of the equal protection, due process, and jury trial rights afforded under the United States and Arizona Constitutions.

Dated: March 25, 1981.

Maurer, Higginbotham & Harris

By /s/ Charles D. Maurer, Jr.

Attorneys for Appellant
James W. Bird

Appendix D

In the Court of Appeals State of Arizona

Division Two

No. 2 CA-CIV 3763
(Pima County Superior
Court Cause No. 173607)

James W. Bird, A.I.A.,
Plaintiff/Appellant,

v.

Samuel Rothman, an individual, James M. Elliott, an individual, and Law Offices of Samuel Rothman and James M. Elliott, a partnership and Does 1 through 10,
Defendants/Appellees.

[Filed April 15, 1981]

ORDER

IT IS ORDERED that Appellant Bird's Motion for Rehearing is hereby Denied.

Dated: April 15, 1981.

/s/ James D. Hathaway
James D. Hathaway,
Chief Judge.

/s/ Lawrence Howard
Lawrence Howard, Judge.

/s/ Ben C. Birdsall
Ben C. Birdsall, Judge.

Appendix E

In the Court of Appeals State of Arizona

Division Two

No. 2 CA-CIV 3763
(Pima County Superior
Court Cause No. 173607)

James W. Bird, A.I.A.,
Plaintiff/Appellant,

v.

Samuel Rothman, an individual, James M. Elliott, an individual, and Law Offices of Samuel Rothman and James M. Elliott, a partnership and Does 1 through 10,
Defendants/Appellees.

[Filed April 22, 1981]

PETITION FOR REVIEW

Appellant James W. Bird, A.I.A. petitions the Supreme Court of Arizona to review the decision of the Court of Appeals in this matter. Appellant's motion for rehearing in the Court of Appeals was denied on April 15, 1981.

Dated: April 20, 1981

/s/ Charles D. Maurer, Jr.

Charles D. Maurer, Jr., Esq.
Maurer, Higginbotham & Harris
601 Montgomery Street,
Suite 511
San Francisco, California

Appendix F

[Letterhead]

Supreme Court, State of Arizona
201-West Wing
Capitol Building
Phoenix 85007

CORRECTED COPY

Supreme Court
No. 15434-PR

Court of Appeals
No. 2 CA-CIV 3763

Pima County
No. 173607

James W. Bird, A.I.A.,
Appellant,

vs.

Samuel Rothman, an individual, James M. Elliott, an individual, and the Law Offices of Samuel Rothman and James M. Elliott, a partnership and Does 1 through 10,
Appellees.

The following action was taken by the Supreme Court of the State of Arizona on May 5, 1981 in regard to the above-entitled cause:

"ORDERED: Petition for Review—DENIED."

Justice Frank X. Gordon, Jr. voted to grant.

Record returned to the Court of Appeals, Division Two, Tucson, this 6th day of May, 1981.

Maryann Hopkins-Young, Clerk

By /s/ Diana K. Bentley
Deputy Clerk

TO:

Charles D. Maurer, Jr., Esq., Maurer, Higginbotham & Harris, 601 Montgomery Street, Suite 511, San Francisco, California 94111

Richard Briney, Esq., Fish, Briney, Duffield, Miller, Young & Adamson, 177 North Church, Suite 711, Tucson, Arizona 85701

Lewis A. Rivlin, Esq., Collister Johnson, Jr., Esq., & Robert J. Miller, Esq., Peabody, Rivlin, Lambert & Meyers, 1150 Connecticut Avenue, N.W., Washington, D. C. 20036

J. Clayton Berger, Esq., Carmichael, McClue & Powell, 4150 North 12 Street, Phoenix, Arizona 85014

Hon. Gilbert Veliz, Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

Hon. William E. Druke, Presiding Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

Appendix G

Charles D. Maurer, Jr., Esq.
Maurer & Higginbotham
417 Montgomery Street, Suite 1007
San Francisco, CA 94104
Telephone: (415) 391-6560
Attorneys for Plaintiff,
James W. Bird, A.I.A.

In The Superior Court Of The State Of Arizona
In And For The County of Pima

No. 173607

James W. Bird, A.I.A.,
Plaintiff,

v.

Samuel Rothman, et al,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

I

Plaintiff, Architect, James Bird hereby incorporates by reference all matters stated and/or referred to in plaintiff's Motion for Summary Judgment.

WHEREFORE, plaintiff requests defendants Motion for Summary Judgment be denied.

Dated: June 6, 1979.

Maurer & Higginbotham

By /s/ Charles D. Maurer, Jr.

Charles D. Maurer, Jr.
Attorneys for Plaintiff,
James W. Bird, A.I.A.

Charles D. Maurer, Jr., Esq.
Maurer & Higginbotham
417 Montgomery Street, Suite 1007
San Francisco, California 94104
Telephone: (415) 391-6560
Attorneys for Plaintiff,
James W. Bird, A.I.A.

In The Superior Court
Of The State of Arizona
For The County of Pima

No. 173607

James W. Bird, A.I.A.,
Plaintiff,

v.

Samuel Rothman, et al,
Defendants.

MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

The plaintiff James Bird moves this court for a summary judgment in his favor upon all the issues in the above entitled action upon the grounds, and for the reasons, that the pleadings, depositions, answers to interrogatories, admissions and affidavits on file show that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

This motion is based upon the provisions of Rule 56 of the Arizona Rules of Civil Procedure, the pleadings, papers, discovery and affidavits in the above entitled action, and the memorandum of points and authorities hereinafter set forth.

Dated: June 5, 1979

Maurer & Higginbotham

By /s/ Charles D. Maurer, Jr.
Charles D. Maurer, Jr.
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

James Bird (hereinafter "ARCHITECT") is a registered professional architect who designed the Amado Greyhound Track in Santa Cruz, Arizona on or about April 1963. A grandstand, at the track is partially enclosed by glass allowing the patrons to view the events taking place at the track. On or about July 11, 1974, a Ms. Lucille Allen occupied a seat inside the grandstand when the glass was shattered with a rock thrown by a child from outside the grandstand. On or about July 1976, defendants, Samuel Rothman and James Elliot (hereinafter "ATTORNEYS") filed a lawsuit on behalf of Ms. Allen naming several defendants including the plaintiff, "ARCHITECT". Acting as counsel for Ms. Allen, "ATTORNEYS" amended their complaint in the underlying action three times. On or about May 13, 1977, Richard L. Thompson, the attorney for "ARCHITECT" filed a Motion for Summary Judgment. On or about August 22, 1977, "ATTORNEYS", representing Lucille Allen, moved the Court for an Order to enter the default of "ARCHITECT" and render judgment by default for the reason that "ARCHITECT" had failed to present himself for a deposition. In fact, "ATTORNEYS" had never noticed the deposition of "ARCHITECT". On September 26, the Honorable James C. Carruth, granted summary judgment in favor of "ARCHITECT" and denied the motions of "ATTORNEYS".

Subsequently, "ARCHITECT" filed this action stating claims against "ATTORNEYS" for malicious prosecution, negligence and abuse of process. "ATTORNEYS" are now petitioning the Court to enter a summary judgment in their

favor on all issues in this action. "ARCHITECT" is petitioning the Court to deny "ATTORNEYS'" motion and grant "ARCHITECT's" Motion for Summary Judgment.

SUMMARY OF ISSUES AND EVIDENCE

Issues	Evidence
1. The underlying case (the Allen lawsuit) involved an action for personal injury to Lucille Allen; apparently sustained when a rock was thrown through a glass window of the Amado Dog Track in Santa Cruz County. The rock was apparently thrown by an eight year old boy who was playing outside the grandstand.	Statement of Richard L. Thompson, page 2, lines 23 to 26 and page 3, lines 1-2. Deposition of James Elliott, page 30, lines 4-8.
2. Attorneys Samuel Rothman and James Elliott represented Mrs. Allen; Mr. Richard Thompson represented Mr. James Bird.	Statement of Richard L. Thompson, page 3, lines 3-7.
3. Mr. Elliott and Mr. Rothman were equally responsible for the investigation, preparation, filing and prosecution of the Allen lawsuit.	Deposition of James Elliott, page 15, lines 8 to 26; page 16, lines 1 to 5; page 25, lines 20 to 25; Deposition of Samuel Rothman, page 4, lines 1 to 15.
4. Summary Judgment was granted in favor of defendant James Bird in the Allen lawsuit.	Deposition of James Elliott, page 136, lines 9 to 16.
5. James Elliott had no technical expertise, formal education or work experience in construction, engineering or architecture and therefore was incapable of evaluating a claim for defective architectural design.	Deposition of James Elliott, page 18, line 26; page 19, lines 1-13.

Issues	Evidence
6. James Elliott had no expert's opinion that Mr. Bird's design was unreasonable and yet Mr. Elliott named Mr. Bird as a defendant.	Deposition of James Elliott, page 39, lines 11 to 17; page 62, lines 19 to 23; page 92, lines 23 to 26; page 93, line 1.
7. James Elliott *never* obtained an expert opinion that Mr. Bird's design was unreasonable.	Deposition of James Elliott, page 103, lines 16 to 20.
8. Mr. Jim Larsen states that Mr. James Elliott sought his opinion as an architect concerning the merits of suing James Bird for defective design of Amado Park Grandstand. Mr. Larsen advised Mr. Elliott such a case was "specious, without merit, out to lunch and ridiculous".	Transcribed statement of Mr. Jim Larsen, architect. (Attached to Affidavit of Charles D. Maurer, Jr.)
9. Mr. Elliott states that in the absence of finding something to exclude Mr. Bird as a defendant he should definitely be sued. Mr. Elliott does not attempt to pinpoint liability.	Depocition of James Elliott, page 22, lines 7 to 11.
10. At the time James Bird was sued, James Elliott had no idea of the causation or fault for Mrs. Allen's injuries. He had not determined if Mr. Bird specified the glass in question. Mr. Elliott felt he must sue to ascertain these facts.	Deposition of James Elliott, page 37, lines 10 to 26; page 38, lines 1 to 8.
11. James Elliott named as defendants, O'Malley Glass & Millwork, simply because he thought they installed the glass which the child broke with a rock.	Deposition of James Elliott, page 46, lines 9 to 13.
12. In fact O'Malley Glass & Millwork did not install the subject glass and were later dismissed.	Deposition of James Elliott, page 53, lines 19 to 24.

	Issues	Evidence
13.	Another architect, Bennie Gonzales, was granted summary judgment in the Allen case because he had only selected paint colors; Mr. Elliott felt Mr. Gonzales should have shared responsibility with Mr. Bird for Mrs. Allen's injuries.	Deposition of James Elliott, page 112, lines 23 to 26; page 113, lines 1 to 10; page 115, lines 5 to 12.
14.	Mr. Eliott believed he had no duty toward Mr. Bird to reasonably investigate the facts and law of the Allen case before naming Mr. Bird as a defendant.	Deposition of Mr. James Elliott, page 85, lines 8 to 9.
15.	Mr. Elliott feels it would be incumbent upon him to sue the architect in a case where a jet plane flies into a high rise building window shattering the glass and thereby injuring the occupants of the building.	Deposition of James Elliott, page 67, lines 3 to 26; page 68, lines 1 to 24.
16.	Even if there were not any glass enclosure and a rock was thrown and someone injured, Mr. Elliott would still have sued the architect.	Deposition of James Elliott, page 91, lines 7 to 12.
17.	Mr. Elliott admits he had two legal problems in the Allen case: (1) proving damages; and (2) proving the liability of Mr. Bird.	Deposition of James Elliott, page 107, lines 3 to 6.
18.	Mr. Rothman admits Mr. Udall's suggestion to name James Bird as a defendant influenced Mr. Rothman's decision.	Deposition of Samuel Rothman, page 6, lines 24 to 25; page 7, lines 1 to 5.

Issues	Evidence
19. During the pendency of the Allen case, Mr. Elliott never noticed the deposition of Mr. Bird or subpoenaed Mr. Bird for the taking of his deposition, yet Mr. Elliott moved for a default judgment based upon Mr. Bird's alleged failure to appear for his deposition. This motion was denied and Mr. Elliott refused to state in his deposition whether he ever expected to get a default judgement against Mr. Bird.	Statement of Richard L. Thompson, page 22, lines 1 to 26; page 23, line 1. Deposition of James Elliott, page 137, lines 23 to 26; page 138, lines 1 to 26; page 139, lines 18 to 24; page 142, lines 10 to 25; page 146, lines 2 to 10.
20. Attorneys John Hobbs and Burr Udall both expressed opinions to the effect that the Allen case was "the strangest case they have ever seen."	Statement of Richard L. Thompson, page 14, lines 1 to 21.
21. Attorneys Rothman and Elliott did not exercise reasonable care in their investigation of the facts and law of the Allen case.	Statement of Richard L. Thompson, page 3, lines 14 to 25.
22. The conduct of attorneys Rothman and Elliott was unreasonable in light of the following facts: (1) fifteen years prior to Mrs. Allen's accident, Mr. Bird designed the grandstand in question with a glass window; (2) Mrs. Allen's injury was caused by a person throwing a rock through the window, shattering the glass; (3) Mrs. Allen had been at the track window almost constantly since the date of the track's opening and she never noticed any rattling, shaking, bending, cracking or breaking of any glass or any design defect of any kind.	Statement of Richard L. Thompson, page 4, lines 3 to 22.

Issues	Evidence
23. In a telephone conversation on July 20, 1976, Mr. Rothman told Mr. Thompson that Mr. Bird was named as a defendant because he had something to do with the track and they just sued everyone in a shotgun fashion.	Statement of Richard L. Thompson, page 9, lines 8 to 26; page 10, lines 1 to 8.
24. In a telephone conversation on January 27, 1978 Mr. Rothman told Mr. Thompson he had named Mr. Bird simply because Mr. Udall suggested they name all the people who had anything to do with the construction of the track.	Statement of Richard L. Thompson, page 16, lines 19 to 26; page 17, lines 1 to 19.
25. Mr. James Bird suffered damages as a result of being named as a defendant in the Allen case. These damages included mental anguish, attorneys fees, loss of income, $3,500 in out of pocket expenses, an increase in insurance premiums, court costs, telephone calls, and other expenses.	Deposition of James Bird, page 29, lines 5 to 16; page 27, lines 11 to 16; page 28, lines 14 to 22; page 38, lines 1 to 11; page 40, lines 6 to 13.

I

"ATTORNEYS" FALSELY ASSERT THAT "ARCHITECT'S" CASE IS INDISTINGUISHABLE FROM DRAGO V. BUONAGURIO.

"ATTORNEYS" give a broadbrush treatment of ARCHITECT's" claims by citing a sampling of cases wherein physicians have been unsuccessful in suing attorneys who had acted as plaintiff's counsel in malpractice cases aimed at the physician. This cavalier manner is indicative of the irresponsible attitude "ATTORNEYS" have exhibited toward the "ARCHITECT" in the underlying action.

In the Drago case, the plaintiff's doctor alleged that the defendant attorney commenced an action against him on behalf of a client charging him with malpractice which contributed to the death of a patient, when, in fact, the plaintiff had no association with the patient, either directly or indirectly. The defendant's attorneys filed a motion to dismiss the complaint for failure to state a cause of action. The Supreme Court granted the attorneys Motion to Dismiss but the Appellate Division reversed this Order stating that complaint alleged a clear intentional wrong causing apparent and foreseeable harm to the plaintiff without excuse or justification, and that, while it did not state a cause of action for any traditional tort, it stated a cause of action which should be cognizable at law. Subsequently, in a memorandum opinion the New York Court of Appeals reversed the Appellate decision and granted the defendant's attorneys motion to dismiss the complaint as against him for failure to state a cause of action.

The reinstatement of the granting of defendants' Motion to Dismiss was predicated on the grounds that:

> "The complaint does not state a cause of action in negligence, abuse of process or malicious prosecution .... The courts have not recognized any liability of the lawyer to third-parties therefore where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability." 46 N.Y. Reports 2d 778 at 779 (December 20, 1978).

The Court refused to grant the plaintiff's relief because they had not couched their claims in traditional tort or contract liability language. Plaintiff was relying on a theory labeled "prima facie tort" and the Court expressed its reluctance to create new liabilities on other than acknowledged theories. The Court explained:

> "An additional reason for judicial restraint in response to invitations to recognize what is conceded to be perhaps a "new, novel or nameless" cause of action [is the fact that] there are proposals before the Legislature to create new liabilities in such a circumstance (e.g., Senate Bill No. 8002 and Assembly Bill No. 10586 [1978]."

The New York Court was making it clear, that for the time being, plaintiffs suing attorneys who have sued them in underlying suits must couch their claims in traditional tort theories. The claims of "ARCHITECT" herein are clearly stated in the traditional and acknowledged tort theories of malicious prosecution, negligence and abuse of process. All of the elements of these causes of action are clearly stated in "ARCHITECT's" complaint and Drago is inapplicable because no cause of action for "prima facie tort" was alleged.

In Drago the Court noted that:

> "Although (the complaint) contains many of the elements common in traditional theories of tort, it does not fit neatly into any of them." *Drago,* Supra 402 NYS 2d 250 at 251.

II

ALL OF THE CASES CITED BY "ATTORNEYS" WHICH DISMISSED CLAIMS FOR MALICIOUS PROSECUTION FOLLOW THE MINORITY VIEWPOINT REQUIRING A SPECIAL INJURY. ARIZONA FOLLOWS A MAJORITY RULE WHICH DOES NOT REQUIRE A SPECIAL INJURY.

Arizona recognizes three elements in an action for malicious prosecution. In *Visco v. First National Bank of Arizona,* 3 Ariz. App. 504, 415 Pac. 2d 902 (1966) the Court stated the three requisites necessary for a plaintiff to recover on a malicious prosecution theory:

> "(1) The proceedings must have been initiated without probable cause;
>
> "(2) The proceedings must have been initiated maliciously, that is, "primarily for a purpose other than that of securing adjudication of the claim on which the proceedings are based;
>
> "(3) The proceedings must have terminated in favor of the person against whom they are brought" (with citations). *Visco,* Supra, Arizona App. 504 App. 507.

The *Visco* decision cites *Ackerman v. Kaufman* 41 Arizona 110, 15 Pac. 2d 966 (1932) which holds that Arizona follows the American and majority rule refusing to require

a showing of a special injury for recovery on a malicious prosecution theory. The Supreme Court in *Ackerman* stated at page 967:

> ". . . it appears that the successful defendant in an action which is maliciously brought against him can at best only recoup a very small portion of the damage inflicted. The cost granted under our Statutes are a very partial indemnity for the defense of an action, and the plaintiff who brings an ill-founded suit in the utmost good faith and the one who brings it from the most unworthy motive are upon exactly the same footing. The reason for this is that the law does not desire to throw around the right of a party to appeal to the Court such risks that a fear of the result might deter him from asserting a claim in which he has an honest belief. The damages which the defendant offers in excess of the very meager cost allowed in a case of that kind are considered as one of the inevitable burdens which the individual must sustain in the interest of good government. Our public policy requires that the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he lose. But this reason does not apply to the plaintiff who seeks to harass, damage, and even ruin the honest citizen by maliciously invoking the aid of the courts in support of a claim which he knows to be unfounded. We are of the opinion that the same public policy which requires that the defendant bear some of the expense of an honest, even though unsuccessful, suit, should give him a full and complete remedy against the dishonest and malicious litigant, and this can only be done under our practice by an action of the nature involved herein.

> "The conclusion which we have reached is that upheld by the large majority of the American courts." (citations).

"ATTORNEYS" would have this Court believe that some "special injury" must be alleged and proven before a plaintiff can recover on a malicious prosecution theory. The "English rule" advanced by "ATTORNEYS" requires some direct interference or other extraordinary injury before recovery is allowed. Neither the Restatement of Torts nor the courts of Arizona follow this rule. See Restatement, Torts, Section 674, 681 (b) and *Ackerman v. Kaufman* Supra. For a discussion of those jurisdictions following the different rules, see *O'Toole v. Franklin* 279 Ore. 513, 569 Pac. 2d 561 (1977); 150 ALR 897 at p. 899 discusses the view that an action will lie where there is no special injury. Dean Prosser has also criticized the English rule stating:

> "Surely there is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury." Prosser, the Law of Torts 851, Section 120 4th Edition, 1971).

III

"ATTORNEYS" DID NOT HAVE PROBABLE CAUSE TO NAME JAMES BIRD AS A DEFENDANT IN THE ALLEN CASE

Whether the facts in a particular case are sufficient to constitute probable cause is a question of law to be determined by a reasonable man test. *Carroll v. Kalar* 112 Ariz. 595 at 596, 545 Pac. 2d 411 (1976). This Court must ask itself based upon the facts of this case whether a "reasonably prudent man (would) have instituted or continued the

proceeding?" *Carroll* Supra, at 595. See also *McClinton v. Rice* 76 Ariz. at 367, 265 Pac. 2d at 431.

It is the responsibility of the trial judge to say whether the facts of a case give rise to probable cause for the filing of a lawsuit. *Carroll* Supra. at 599.

> "Resolution of the question of the existence of a triable issue of fact on the question of probable cause requires the isolation of the factual and legal elements of probable cause itself. The trier of fact must resolve any conflict in the evidentiary underpinning of the facts of probable cause. Once that conflict has been resolved, the question of whether the facts as they are found to exist constitute probable cause for bringing the former action is a question of law to be resolved by the judge." (citations). *Tool Research & Engineering Corporation v. Hennigson*, 46 Cal. App. 3d 675 at 682, 120 Cal. Rptr. 291 (1975).

This Court must be satisfied that the defendants' attorneys, reasonably investigated the facts of the Allen case and industriously searched the law, resulting in an honest belief that Ms. Allen had a tenable claim against "ARCHITECT". (citations) *Tool Research* Supra at 683.

It is not enough that the plaintiff's attorney in an underlying suit self-servingly states his opinion that a valid claim exists.

> "The test (of probable cause) is twofold. The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard." *Tool Research* Supra at 683 (1975).

From the facts cited above "ATTORNEYS" clearly did not have probable cause for the filing of the suit against "ARCHITECT" in the *Allen* case.

True, an attorney has a duty to represent his client zealously but he cannot abuse that duty by prosecuting a claim which a reasonable lawyer would not regard as tenable by unreasonably neglecting to investigate the facts and law in making his determination to proceed. If he does, his clients adversary has a right to assert malicious prosecution against him if his efforts prove unsuccessful. *Norton v. Hines* 49 Cal. App. 3d 917 at 924, 123 Cal. Rptr. 237 (1975).

IV

MALICE MAY BE INFERRED FROM A LACK OF PROBABLE CAUSE

Termination of the underlying suit in favor of the "ARCHITECT" suggests that there was no probable cause for naming "ARCHITECT" as a defendant. From a lack of probable cause, the Court may infer malice sufficient to constitute the proof necessary to sustain a subsequent countersuit for malicious prosecution. *Tool Research* Supra at 682 n.2. See also Mallen & Levit, *Legal Malpractice* Section 45 p. 76, West Publishing Co. (1977), 8 Pacific Law Journal 897 at 905, n.67 and 68; 4 Witkin, Summary of Calif. Law, 8th Ed. Torts Sec. 253.

V

IN ARIZONA ATTORNEYS ARE LIABLE TO NON-CLIENTS FOR FAILURE TO EXERCISE REASONABLE CARE IN THE INVESTIGATION, PREPARATION AND PROSECUTION OF LAWSUITS.

Plaintiff's attorneys must exercise reasonable care in the investigation of facts and law as well as the preparation and prosecution of lawsuits against their adversaries. Failure to do so subjects them to liability despite a lack of privity.

> ". . . the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm" *Fickett v. Superior Court of Pima County,* 27 Ariz. App. 793 at 795, 558 Pac. 2d 988 (1976). See also the cases cited therein including *Biakanja v. Irving,* 49 Cal. App. 2d 647, 320 Pac. 2d 16 (1958) and *Lucas v. Hamm,* 56 Cal. 2d 583, 15 Cal. Reptr. 821, 364 Pac. 2d 685 (1961) and others.

The *Tool Research* case cited above makes it clear an attorney's responsibility in the representation of a client involves both a reasonable investigation of the facts and an industrious search of legal authority which must satisfy both his subjective belief and an objective standard that the claim merits litigation. Lacking this, the plaintiff's at-

torney subjects himself to the exposure of a negligence claim by his client's adversary. Applying the analysis in *Fickett* to the case at bar, forces the conclusion that the "ATTORNEYS" conducted themselves negligently toward the "ARCHITECT". Clearly, the filing of the *Allen* lawsuit was intended to affect the "ARCHITECT" and it was foreseeable that the "ARCHITECT" would suffer an economic injury if the plaintiff's attorneys did not conduct themselves reasonably. The facts cited above disclose that the injuries suffered by the "ARCHITECT" were directly connected and caused by the filing of a suit against the "ARCHITECT". The moral blame to be attached to the "ATTORNEYS'" conduct can be measured by the "ATTORNEYS" failure to ever obtain expert testimony to substantiate their claims and nevertheless they proceeded to Court asking for a summary judgment. Worse yet, the basis for "ATTORNEYS'" Motion for Summary Judgment in the underlying suit was patently false; that is, the "ARCHITECT" never failed to appear for a deposition by the "ATTORNEYS", since the "ATTORNEYS" never noticed his deposition. The presence of this kind of conduct by attorneys in the State of Arizona dictates that the "ATTORNEYS" be held accountable to the "ARCHITECT" on a negligence theory.

VI

PUBLIC POLICY AND EQUAL PROTECTION ADVOCATE THE LIABILITY OF ATTORNEYS TO ADVERSARIES FOR NEGLIGENCE IN THE INVESTIGATION, PREPARATION, FILING AND PROSECUTION OF LAWSUITS.

Third-party liability has been extended to the following professions: Physicians, *Kaiser v. Suburban Transportation System,* 65 Wash. 2d 461, 398 Pacific 2d 14 (1965); Architects, *Inman v. Binghamton Housing Authority,* 3 N.Y. Suppl.2d 137, 164 N.Y. Suppl.2d 699, 143 Northeast 2d 895 (1957), *Montijo v. Swift,* 219 Cal. App. 351, 33 Cal.Rptr. 133 (1963); Psychiatrists and Psychiatric Institutions, *Tarasoff v. Regents of University of California,* 17 Cal. 3d 425 (1976); Accountants, *Ryan v. Kanne,* 170 Northwest 2d 395 (Supreme Court, Iowa 1969); Abstractors, *Brown v. Sims,* 22 Indiana Appeals 317, 53 Northeast 779 (1899); Appraisers, *United States v. Neustadt,* 281 Fed. 2d 596 (4th Cir. 1960); Notaries *Lowe v. Wright,* 40 Tenn. Appeals 525, 292 Southwest 2d 413 (1956); Engineers, *Texas Tunneling Co. v. City of Chattanooga, Tenn.,* 204 Fed. Supp. 821 (E.D. Tenn. 1962); Bankers, *Sun & Sand, Inc. v. United California Bank,* 21 Cal. 3d 671 (1978); Weighmasters, *Glanzer v. Shepard,* 233 N.Y. 236, 135 Northeast 275 (1922); Surveyors, *Kent v. Bartlett,* 49 Cal. App. 3d 724, 122 Cal. Rptr. 615 (1975); Real Estate Brokers, *Granberg v. Turnham,* 161 Cal. App. 2d 390, 333 Pac. 2d 423 (1958) and others.

There is no rational basis for extending the liability of all the professions, except attorneys, to third parties. It isn't true, as older authorities have suggested, that the

liability of attorneys to non-clients for negligence will subvert the public policy of favoring free access to the Court by causing lawyers to refuse to take cases which are now justifiably commenced. See *Savings Bank v. Ward*, 100 U.S. 195 (1879). Requiring attorneys to satisfy standards of reasonableness before the filing of a lawsuit should not serve to discourage the filing of cases which stand any reasonable chance of success. More likely it would encourage preliminary investigation of a proposed defendant's culpability, thereby protecting against unjustifiably being named as a party. The policy in favor of free access to the Courts is no stronger than the policy favoring an individual's right to be free from involvement in futile or unfounded litigation. Further benefits of the rule holding attorneys liable to non-clients for negligence are reduced court costs and less congestion. Also, placing the cost of an attorney's failure to reasonably investigate his case on the attorney himself in the form of malpractice insurance is at least as economical as requiring every other professional to spend the deductible portion of his insurance policy while plaintiff's counsel investigates his case.

Morality and ethics require the liability of attorneys to non-clients for negligence be the same as their fellow professionals.

VII

"ATTORNEY'S CONDUCT CONSTITUTES AN ABUSE OF PROCESS.

Prosser states the essential elements of the cause of action for abuse of process as follows:

> "First, an ulterior purpose, and second a willful act in the use of the process not proper in the regular conduct of the proceeding." Prosser, Torts 3rd Ed. Sec. 115 p. 877 (1964).

Although settlement may be a legitimate objective of filing suit, it cannot be when the claims advanced in the suit are unfounded or spurious. The attorneys in the instant case never developed a reasonableness basis for establishing the liability of the "ARCHITECT". Therefore, their filing of the lawsuit naming the "ARCHITECT" as the defendant was done for the purpose of forcing him to pay a sum less than the cost of defense in exchange for a dismissal. This constitutes an ulterior motive and willful act inconsistent with the ordinary purpose for which complaints are filed. Accepted legitimate reasons for filing a lawsuit are (a) to establish the liability of the defendant and obtain relief demanded; and (b) to settle or compromise a disputed claim. Neither of these purposes existed in the *Allen* case filed by "ATTORNEYS" herein, consequently they are liable to the "ARCHITECT" for abuse of process and the "ARCHITECT" is entitled to recover his damages.

CONCLUSION

When the law cited herein is applied to the established facts as outlined above, "ATTORNEYS" are clearly liable to "ARCHITECT" as a matter of law on malicious prosecution, negligence and abuse of process theories.

WHEREFORE, "ARCHITECT" respectfully submits that "ATTORNEYS" Motion for Summary Judgment be denied and "ARCHITECTS" Motion for Summary Judgment be granted with costs.

Dated: June 6, 1979.

MAURER & HIGGINBOTHAM

By /s/ CHARLES D. MAURER, JR.

Charles D. Maurer, Jr.
Attorneys for Plaintiff,
James W. Bird, A.I.A.

Charles D. Maurer, Jr., Esq.
Maurer & Higginbotham
417 Montgomery Street, Suite 1007
San Francisco, California 94104
Telephone: (415) 391-6560
Attorneys for Plaintiff,
James W. Bird, A.I.A.

In The Superior Court of The State of
Arizona In and For The County of Pima

No. 173607

James W. Bird, A.I.A.,
Plaintiff,
v.
Samuel Rothman, et al,
Defendants.

AFFIDAVIT OF CHARLES D. MAURER, JR. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND POINTS AND AUTHORITIES IN OPPOSITION TO "ATTORNEYS" MOTION FOR SUMMARY JUDGMENT.

I, Charles D. Maurer, Jr., declare, and if sworn as a witness could and would testify competently to the following:

1. I am an attorney at law, licensed to practice before all the courts of the State of Arizona and a partner in the law firm of Maurer and Higginbotham, attorneys for plaintiff.

2. Exhibit A attached is a true and correct copy of the sworn statement of Richard L. Thompson taken July 27, 1978 at Phoenix, Arizona. If called to testify in this case, Mr. Thompson will substantiate his sworn statement and the truth of the matt rs stated therein.

3. Exhibit B is : transcription of the recorded statement of Mr. Jim Larsen, architect. If called to testify in this action, Mr. Larsen will substantiate his transcribed recorded statement and the truth of the matters stated therein.

I declare of my own personal knowledge under penalty of prejury that the foregoing is true and correct.

Dated this 5 day of June, 1979 at San Francisco, California.

/s/ Charles D. Maurer, Jr.

Charles D. Maurer, Jr.

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO } s.s.

On this 6th day of June, 1979, before me, the undersigned, a Notary Public in and for the said County and State, duly commissioned and sworn, personally appeared CHARLES D. MAURER, JR., known to me to be the person whose name was subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Bernadette Kurpinsky

[Seal]

EXHIBIT A

SWORN STATEMENT OF
RICHARD L. THOMPSON

July 27, 1978
Phoenix, Arizona
Suite 7, 132 South Central Avenue
3:30 o'clock p.m.

APPEARANCES:

Mr. Charles D. Maurer,
Attorney at Law.

Mr. John A. Brabec,
Court Reporter.

RICHARD L. THOMPSON,

called as a witness herein, having been first duly sworn by the Notary, was examined and testified as follows:

• • • •

ORAL-EXAMINATION

BY MR. MAURER:

Q. Will you state your name, please?

A. Richard Thompson.

Q. Where do you live?

A. In Phoenix, Arizona; 4201 North 15th Avenue.

Q. And where do you work?

A. I work in Phoenix; 132 South Central, Suite 7, and adjoining offices.

Q. And how are you employed?

A. I'm an attorney at law.

Q. Mr. Thompson, you had occasion to represent a Mr. James W. Bird, AIA, in the Superior Court, State of Arizona, County of Pima, Civil Action number—I am sorry—Civil Action number 159735; is that right?

A. Yes.

Q. Can you tell us briefly what the nature of that case was?

A. It was an action for damages for the personal injury to Lucille Allen; apparently sustained when a rock was thrown through a glass window of the Amado Dog Track in Santa Cruz County.

Q. And you represented Mr. Bird?

A. Yes.

Q. And who represented Lucille Allen?

A. To the best of my knowledge, two attorneys, James Elliott and Samuel Rothman.

Q. And both those gentlemen are Tucson attorneys?

A. To my knowledge, or on my information and belief.

MR. MAURER: Off the record.

(Thereupon a discussion was had off the record.)

Q. (BY MR. MAURER) Mr. Thompson, during the course of your representation of Mr. Bird in this action, did you form any opinions regarding the standard of care that the plaintiff's attorneys employed in the investigation of the facts and law of their case?

A. (BY THE WITNESS) Yes. I formed an opinion.

Q. And what was that opinion?

A. I opined that they did not exercise reasonable care in discovering the facts or in applying those facts to the law as the case applied to Mr. Bird.

MR. MAURER: Off the record again.

(Thereupon a discussion was had off the record.)

Q. (BY MR. MAURER) Generally, Mr. Thompson, what was the basis of your opinion?

A. (BY THE WITNESS) Well, the allegations, as best I could determine from the pleadings and the amended pleadings were that Mr. Bird was negligent because some fifteen years prior to the incident, the alleged incident to have caused damage to Mrs. Allen, the defendant, Bird, had designed a race track and had put glass in a window.

The allegations indicated, or the facts that were readily available to the plaintiff's lawyers, through their client, would indicate and did indicate that the injury caused to Mrs. Allen was the result of a person throwing a rock through a glass window.

Q. As distinguished from a designed defect?

A. As distinguished from a design defect, yes. In fact, Mrs. Allen had been at that window and present in the dog track since the date of its opening, according to her testimony, almost constantly when the track was opened. And she had never seen any rattling, shaking, bending, cracking or breaking of any glass or any design defect of any kind.

Q. As early as the filing of the complaint by the attorneys, Messrs. Rothman and Elliott; did you ever give any consideration to counter measures against these attorneys, based on what you felt to be their lack of reasonable care?

A. Yes. I was advised at the pendency of the case, oh, to the best of my recollection, on July 20th, 1976, the information that the insurance carrier passed onto me was that Mr. Baird had designed this dog track or a portion of it in 1965.

That the rock had been thrown through the window, that the glass broke, that the victim or the plaintiff in this case had gotten cut and had sued the architect

In discussing the plan of defense, of course, I referenced the possibility of bringing an immediate measure, a counter claim, for abuse of process or malicious prosecution, if those in fact were the bases of the plaintiffs action. I would like to add at that time I had not received a copy of the complaint.

Q. Do you have anything in your files that reflect that you gave consideration to these possible counter measures?

A. Yes. I have the notes that I took from the telephone call and I have a note in that regard—off to the side in

the margin—with regard to the possible counter action against the plaintiffs.

Mr. Maurer: Why don't we mark this. Off the record a minute.

(Thereupon a discussion was had off the record.)

(Thereupon Exhibit T-1 was marked for identification by the reporter.)

Mr. Maurer: Let's go back on the record for purposes of this statement, Mr. Thompson.

Q. (By Mr. Maurer) I would like to show you what has been marked as Exhibit T-1 and ask you to identify it.

A. (By the Witness) That's my notes from a telephone call that I referenced. A call received on or about July 20th, 1976.

Q. Mr. Thompson, what is the applicable notation on that Exhibit one?

A. This is a response when I mentioned the bringing of a counteraction. The insurance carrier's response was—and this is paraphrased, of course, since it's a notation—"steer away from a malicious prosecution or abuse of process action."

Then it's hyphenated, which would indicate to me, with one exception. And it says, "On Bird's say so only."

In other words, I deemed that note was to indicate that if Bird would request such an action, I could proceed. Otherwise, avoid it.

Q. Ultimately you discussed these counter measures with Mr. Bird.

A. Yes. I believe on more than one occasion. I think perhaps Mr. Bird mentioned it on the very first conver-

sation I had with him, which, of course, was a telephone call.

And I think he may have even raised it as, "Can't we do something about this? Can't I sue them?" This type of thing. And there were discussions subsequent.

Q. Mr. Thompson, Mr. James Elliott has advised us in his deposition taken in a case naming him as a defendant, that with regard to the Lucille Allen case he had a curious telephone conversation with you, wherein you asked him where he got the name of Mr. Bird for the purposes of joining him in as a defendant.

And that Mr. Elliott told you where he got that idea, and that you indicated also in that telephone conversation that your client, Mr. Bird, was not interested in the costs incurred in the Lucille Allen case.

Do you recall having that telephone conversation with Mr. Elliott?

A. I recall having two telephone conversations throughout the pendency of this litigation, with Mr. Elliott. I assume that he is talking, since he is referring to costs, to the last telephone conversation.

Q. What was the date of that telephone conversation?

A. Strike that answer. I want to correct that. I never discussed costs with Mr. Elliott on any occasion. There was a telephone call made to Samuel Rothman on January 27th, 1978.

The call was to Tucson from this office. And the purpose of that call was, as Mr. Elliott reflects, to determine how Bird had gotten named in this action. Do you want me to—

Q. Go ahead.

A. I recall Mr. Rothman answering the phone and I, by the way, made a report in regard to Mr. Rothman's conversation that very day, and have documented the fact that I talked to him.

Mr. Rothman, I asked Mr. Rothman generally—and I am paraphrasing—I made no direct notes. I asked him how the case was coming along. I had no information that it had come to an end, except as to Mr. Bird and a couple other defendants.

Q. You had already been—

A. Dismissed from the case, yes. We were granted a judgement in our favor and dismissed.

Q. Go ahead.

A. The response of Mr. Rothman was something in the nature that, oh, the case has been settled and I'm sure you are calling about your costs.

He referenced one of the other lawyers in the case, John Hobbs, the lawyer for defendant, Gonzales, another architect who had been summaried out, dismissed.

He indicated that Hobbs had been looking for his costs and he assumed that I was, too, at that time. And I said "No. That is not my concern."

And I indicated that what I was calling for was another matter. At no time did I indicate that my client had no desire for costs. In fact, quite the contrary.

Simultaneously with the filing of the formal judgement in behalf of Mr. Bird—by the way, that judgement awarded Mr. Bird costs as a matter of judgement. I filed a notice of costs and those costs were tacked on by the Clerk of the Court of Pima County against Lucille Allen.

The judgement has never been satisfied and I have not sought to execute upon the judgement, but the amount is due and owing.

Q. Did you ever have a telephone conversation with Mr. Elliott wherein he told you where he got the name of Mr. Bird for the purposes of joining him in as a defendant?

A. Now, would you read the question back?

(Thereupon the pending question was read back by the reporter.)

A. (BY THE WITNESS) No. I do not believe I ever discussed that with Mr. Elliott. On two occasions I discussed it with Mr. Rothman. Both the call I just referenced and on the call—a call or during a call placed to Mr. Rothman on July 20th, 1976 at his offices in Tucson.

Q. That is approximately two years earlier?

A. Yes.

Q. What was the substance of the telephone call on July 20th, 1976 to Mr. Rothman?

A. That is the date that I received the information that I would be handling the defense of Mr. Bird. And I was not advised at that time when Mr. Bird had been in fact served.

The rules require that I file an answer within twenty days. I had not had an opportunity to contact Mr. Bird, and I wanted to make sure that there was not a default judgement entered against him.

So I contacted Mr. Rothman on that occasion to inquire as to the possibilities of an open extension.

And based on the information that I had received over the telephone from the insurance carrier, specifically that

a rock had been thrown through a window that had been installed at least fifteen years earlier, and that the architect had, as a result, been sued, I felt it necessary to determine why on earth the architect had been sued.

I asked Mr. Rothman and he was quite equivocal. I believe he indicated at that time that something to the effect that they had gotten names of a whole lot of people that had had something to do with the race track and just sued them all.

My recall to that conversation—my paraphrasing the notes in regard to that conversation—would characterize that "sued them all" as shot gunning.

Q. Mr. Thompson, did you ever mislead Mr. Elliott during the conduct of this litigation?

A. No. I'm sure I did not mislead Mr. Elliott. If Mr. Elliott was mislead, it was Mr. Elliott that mislead Mr. Elliott.

Q. Mr. Elliott maintains that when you first got into the case you were granted an open extension of time to answer, and then the situation changed and you were asked to answer and you said quote "Don't worry. I have an answer ready to go. I will file it right away" unquote.

Then in lieu of that you filed a motion and a deposition was taken. And at that point you said quote "Oh, well, now I see what the case is. Don't worry about it" unquote.

Did you say that to Mr. Elliott?

A. No. On no occasion.

Q. Did you discuss with Mr. Elliott anything with regard to your filing a responsive pleading in the case?

A. Yes. As I indicated, on July 20th of 1976 I contacted Mr. Rothman and requested an open extension of time in which to answer.

I confirmed that telephone conversation to Mr. Rothman by mail. He indicated that he would give me a ten days notice before filing a default, and otherwise I would have an open extension.

Of course, the purpose is already stated. That is, I had not had occasion to, one, see the complaint or, two, contact the client to determine what his involvement, if any, was in the Amado Dog Track.

On September 14th, 1976 I received a letter from Mr. Elliott indicating that he was calling my extension and requiring an answer in the matter within ten days.

I had previously and promptly contacted Mr. Bird and—well, by telephone on two occasions. And I think once by letter. And requested him to forward any information he had pertaining to the Amado Dog Track situation.

That information which would be necessary to frame an answer had not yet been received by the time of Mr. Elliott's letter of September 14th.

I believe I re-contacted Mr. Bird to assure that that was being sent out. I was advised it would be forthcoming. And prior to the last day then of—

By the way, that letter of 9-14 was received on the 16th. On the 23rd I called Mr. Elliott for the first time and indicated that I was in no better position.

I had no more information and could I have more time in which to answer. I did not confirm that telephone call,

but noted it on his letter, that he had stated that I could have a quote "couple weeks" close quote.

Mr. Bird did in fact mail the information on September 21, but it was not received by me until after my contacting Mr. Elliott on the 23rd.

MR. MAURER: Mark that letter then, please.

(Thereupon Exhibit T-2 was marked for identification by the reporter.)

Q. (BY MR. MAURER) Let me show you what has been marked as plaintiffs' exhibit T-2 and ask that you identify it?

A. (BY THE WITNESS) Yes. That's the letter I referred to. The letter that was sent to me from, apparently, Elliott. Dated September 14th, and reflects my notes in regard to when I received it, when I called Elliott and what he had stated.

Q. The telephone call to Mr. Elliott on September 23rd, 1976; is that the first time you spoke with Mr. Elliott?

A. That is the first time that I had spoken to Mr. Elliott.

Q. Mr. Thompson, the deposition of Lucille Allen was taken prior to your filing an answer, but subsequent to your filing a motion for a more definite statement; is that correct?

A. That's correct.

Q. Did you have any conversations with any of the persons present at the deposition of Lucille Allen; regarding your filing of pleadings in this case?

A. I recall no conversations in regard to my filing of pleadings in this case. Mr. Elliott was not even present at that deposition.

I had on the one occasion talked to him and never met him. Mr. Rothman was present. I recall arriving at the deposition a little late. Everybody was in the room. I had to drive from Phoenix. I remember meeting Mr. Rothman as we were sitting down to take the deposition.

I remember saying a few words to Mr. Rothman as we were leaving the deposition. I then stood outside of the court reporters office and discussed the case with two other defense counsel.

Q. Who were those defense counsel?

A. Burr Udall and, I believe, John Hobbs, the Gonzales architect.

Q. What was the substance of that conversation with Mr. Udall and Mr. Hobbs?

A. I remember one comment almost verbatim that Mr. Udall made. The reason I remember it is it came up later in communication.

And it was something to the effect that, "this is the strangest case I have ever seen." I believe John Hobbs, perhaps, commented about both of us driving from Phoenix.

And there was some discussion as to, well, what do we do next, among the three defense lawyers. I believe I inquired if anybody knew why in the hell we were in the case.

Q. And did you get a response?

A. No. Nobody seemed to know why anyone was in the case, particularly John Hobbs. He was just as confused and concerned as to why we were there as I was.

Q. Who did Mr. Hobbs represent?

A. He represented Benny Gonzales, an architect who, apparently, or allegedly, designed interior paints—schemes.

Q. Did you talk at all with Mr. Rothman at that deposition?

A. I recall no conversations with Mr. Rothman; other than "Hello, how are you." And perhaps something in regard to an Exhibit, the floor plan. There may have been some off the record discussion with regard to that.

I certainly would not have indicated that I was going to withdraw my position for more definite statement, as the deposition did no more to establish an issue of liability or to clarify the pleadings, than the pleading themselves. There was nothing gleaned there that made the case any clearer.

MR. MAURER: Off the record.

(Thereupon a discussion was had off the record.)

MR. MAURER: Back on the record.

Q. (BY MR. MAURER) Mr. Thompson, I believe you indicated that on July 20th, 1976 in your telephone conversation with Mr. Rothman, regarding an open extension of time, that Mr. Rothman made some representations regarding the reasons why Mr. Bird was being named in this lawsuit; is that correct?

A. (BY THE WITNESS) That's correct.

Q. What was the substance or text of those conversations?

A. The text, as best I can recall, there was some reference to the fact that, "Oh, Elliott brought them in." I believe Rothman indicated that the other lawyer had

brought this about. I was unaware during this conversation, that there were in fact two separate lawyers.

I thought perhaps he meant somebody in the firm with him or a plaintiff. I hadn't received the complaint so I wasn't aware of the existence of the two.

Q. You did not know the relationship between Mr. Rothman and Mr. Elliott; is that what you are saying?

A. Yes.

Q. What was the conversation with Mr. Rothman which seemed to indicate earlier he irresponsibly named Mr. Bird?

A. He indicated, as I stated, that several—the whole group of people's names who had something to do with the dog track, had been determined, and that they would all be named.

Q. About two years later then on January 27th, 1978, after you had successfully extricated Mr. Bird from this lawsuit by virtue of the Court's granting your motion for summary judgement, you had another telephone conversation with Mr. Rothman?

A. That's correct.

Q. In that telephone conversation did you again discuss why Mr. Bird had ever been named in this lawsuit?

A. Yes. Quite frankly, that was the purpose of my call. I wanted to make a determination and to pin it down a little bit more as to why Bird had been sued.

And that is the call I referenced earlier, where Mr. Rothman indicated that he felt I was calling to collect my costs, and that he could pay some of them.

And I said, "Well, no, that's not what I'm calling for. I'm not concerned about the costs. I really want to know

how on earth did Mr. Bird get involved in this suit in the first place."

During that conversation Mr. Rothman indicated that Mr. Udall had suggested that they name all of the people who had anything to do with the construction of the race track, or words to that effect. And that Mr. Bird was discovered to have been one of the persons who had something to do with the construction or the design of the track.

MR. MAURER: Off the record.

(Thereupon a discussion was had off the record.)

MR. MAURER: Back on the record.

Q. (BY MR. MAURER) Did Mr. Rothman explain that any further to you?

A. (BY THE WITNESS) Well, I'm trying to recall the general conversation a little bit more to come, if I can, come up with specifics. After the little bit on our calling for costs, I didn't want to come out and directly indicate the purpose of my call. And the purpose, of course, was to find out exactly what I said. That is, how Bird got named.

And I was afraid, perhaps, if I just asked point blank, that Rothman might pull back in his shell and not tell me. He indicated, of course, that Udall had advised it or discussed it with him and suggested that they name the other defendants, as I stated.

Q. What did you ask him then?

A. Well, I asked him how in the hell did Mr. Bird get in here, get named in here, of course.

Q. And what did he say?

A. Well, Udall just suggested we put these guys in and get some defendants in there on the case, or words to that effect.

Q. Did he say anything to you as far as the factual basis for his naming of Mr. Bird in this lawsuit?

A. None. Nothing at all in regard to the factual basis. And for that matter, nothing in regard at all to a legal basis.

MR. MAURER: Off the record.

(Thereupon a discussion was had off the record.)

MR. MAURER: Back on the record.

Q. (BY MR. MAURER) Did this telephone conversation do anything to reaffirm your earlier beliefs that Mr. Rothman and/or Mr. Elliott had fallen below the applicable standard of care for attorneys in Arizona; with regard to the investigation, preparation and prosecution of a lawsuit?

A. Yes.

Q. Mr. Thompson, as early as August 5th of 1976 you stated to Mr. Bird that, in your opinion, the plaintiff was certainly strained to name Mr. Bird in the Lucille Allen case; is that correct?

A. (BY THE WITNESS) That is correct.

Q. Mr. Thompson, at any time during the course of your representation of Mr. Bird in the Lucille Allen case, did you not act in good faith with the other counsel involved?

A. At no time did I fail to act in good faith.

Q. Was the deposition of Mr. Bird ever noticed during the pendency of the Lucille Allen case?

A. Yes.

Q. Who noticed that deposition?

A. Burr Udall, after he had received a demand letter.

Q. Did you ever mislead Mr. Elliott with regard to making Mr. Bird available for a deposition?

A. No.

Q. Did Mr. Elliott ever notice the deposition of Mr. Bird?

A. Never.

Q. Did you ever refuse to make Mr. Bird available for Mr. Elliott to take Mr. Bird's deposition?

A. Well, having never been requested of a specific date, I never had Mr. Bird come over from San Diego. But I never refused.

In fact, quite the contrary. I alerted Mr. Bird that his deposition more likely than not, would be noticed by Mr. Elliott, and that he would have to come over to Tucson prior to September 12th. And advised him that I would give him the date as soon as I received it.

Q. On or about August 1st, 1977 you had a telephone conversation with Mr. Elliott regarding your motion for summary judgement?

A. That's correct.

Q. Could you describe for us the substance of that telephone conversation?

A. Yes. I placed the call to Mr. Elliott on August 1st to his office in Tucson because I had several months earlier, filed a motion for summary judgement in this case,

and noticed a hearing on that judgement for September 12th.

As of August 1st I had never received a response and I was concerned that, perhaps, Mr. Elliott had not been served with the motion.

I contacted Mr. Elliott to make certain that he had in fact received the motion and it had been properly served.

During the conversation Mr. Elliott requested whether or not Mr. Bird would be available for his deposition prior to September 12th. I assured him that he would be.

And about four days later I was in San Diego at a meeting with Mr. Bird and at that time advised him of this request, and alerted him to the pending deposition.

Q. What do you mean by "the pending deposition?"

A. Well, at that time I fully expected to receive a notice of deposition and I alerted Mr. Bird of the fact that he would have to clear his calendar in order to attend, should it be noticed.

Q. You already had a notice of deposition from Mr. Udall?

A. The Udall notice had been vacated back in May of 1977.

Q. So your discussion with Mr. Bird, regarding the pending deposition, was really a discussion regarding the possibility of Mr. Elliott noticing the deposition of Mr. Bird?

A. Yes. Mr. Elliott's conversation indicated that he would be noticing the deposition and setting a date.

Q. But in fact he never did notice that deposition?

A. No, sir. Not to my knowledge, and I checked the court records. There were no notices there.

Q. Nor did you ever stipulate to make Mr. Bird available at a certain time on a certain date at a certain place for the purpose of Mr. Elliott taking Mr. Bird's deposition?

A. No, sir. There was no discussion of dates and times, other than before September 12th.

Q. And yet Mr. Elliott filed a motion to enter a judgement of default against your client, Mr. Bird, on the basis that you had not made Mr. Bird available for deposition?

A. Yes, he did.

Q. The motion for summary judgement which you filed and Mr. Elliott's motion to enter a judgement of default were to be heard on the same day?

A. That's correct.

Q. What was the result?

A. The Court curtly dismissed the motion of Mr. Elliott and promptly granted Mr. Bird's motion for summary judgement.

MR. MAURER: Off the record.

(Thereupon a discussion was had off the record.)

MR. MAURER: Back on the record. I think this is all we need.

/s/ R. L. THOMPSON

Richard L. Thompson

STATE OF ARIZONA
County of Maricopa } ss.

BE IT KNOWN that I took the foregoing sworn statement pursuant to Notice; that I was then and there a Notary Public in and for the County of Maricopa, State of Arizona, and by virtue thereof authorized to administer an oath; that the witness before testifying was duly sworn by me to testify to the whole truth and nothing but the truth; that said sworn statement was reduced to writing under my direction, and the foregoing twenty-three (23) typewritten pages constitute a full, true and accurate transcript of the testimony of said witness, to the best of my skill and ability.

WITNESS my hand and seal of office this 1st day of August, 1978.

/s/ JOHN A. BRABEC
John A. Brabec
Notary Public

My Commission Expires:
April 23, 1979

[Letterhead]

James M. Elliott
Attorney at Law
Home Federal Tower
32 North Stone Avenue
Tucson, Arizona 85701

Telephone 624-0558
Area Code 602

September 14, 1976

Richard L. Thompson, Esq.
Luhrs Central Building
Suite #7
132 South Central
Phoenix, AZ 85004

Re: Lucille Allen v. American Greyhound Racing, Inc., et al, Pima County Superior Court Rm# 179735

Dear Mr. Thompson:

This letter is to request that you file your answer on behalf of James Bird in the above referenced matter within 10 days of your receipt of this notice.

We are beginning to move ahead with discovery, and I believe it would be advantageous to all parties for you to file your answer as soon as possible.

If for any reason you are unable to comply with this request it is a timely matter, please call this office.

Very Truly yours,

/s/ JAMES M. ELLIOTT

James M. Elliott

JME: ea

EXHIBIT B

INTERVIEW

JIM LARSEN

Q. What I was concerned with, is, there—an Attorney by the name of Elliott was filing a suit against Bird's Architects and a couple of other people. Do you recall ever talking to—

A. Yes, he called me.

Q. What was the gist of your conversation, if you wouldn't mind telling me.

A. No, I wouldn't mind, but I need some information so I can send you a bill.

Q. Okay—you want to bill us for it.

A. Yep.

Q. All right—what the heck—I don't know, you know, I don't mind. What would that be—what—what—can you tell me now and then I'll be glad to give you our—

A. Well, I bill out like attorneys do at a value received situation and I sent the other guy a bill which he never paid like, you—

Q. Oh, you mean Elliott.

A. —know how attorneys are.

Q. Okay, well, you see. I'm completely opposite of Elliott. But, anyway, ah, you figure you should get a bill for Elliott, or for the stuff that you did, or for what you're going to tell me now.

A. Well, no, I sent him a bill for the conversation. I also didn't help him.

Q. Okay.

A. Let me explain what—he called, and said that there was some kind of incident at the Amado Race Track. I had no idea how he got my name, still don't know.

Q. Okay.

A. There was an incident at the Amado Race Track where some rocks had been thrown and hit some glass and some pieces of glass had showered into the spectator area.

Q. Mm-hmm, that's the one I'm thinking about.

A. And so he asked me a number of questions concerning the liability of the architect-engineer involved in it and I said that I didn't feel that the architect or engineer could possibly design for a set of circumstances of that nature.

Q. I see.

A. See, it's impossible to accommodate all of the humankind and their activities in the design of buildings.

Q. Mm-hmm.

A. If we were to do so, then we would have large walls in front of all of our houses so cars couldn't travel off the street, or we would build fence rows of trees or things like that, so, you know, and you can only be responsible to the normal activity of the building.

Q. Right.

A. And so I felt that he was completely "out-to-lunch" trying to make a claim against this particular guy,—

Q. Uh-huh—how far—how-

A. —and I told him so.

Q. —long ago was that, do you recall. A couple—

A. No, it's—

Q. —of years or so.

A. —been more than a year, but other than that I don't know.

Q All right, and it was Elliott that called you.

A. The name's familiar. It seems to ring a bell.

Q. Okay, did he ask you at all about the City Code or—

A. He asked me about building codes. He asked me about building codes.

Q. Uh-huh.

A. And I said that the only building code that this could possibly be responsive to would be the nature of the code for glass and there—there have been changes and he couldn't possibly attempt to make a claim against the architect-engineer under a new code if the building had been built under a previous code.

Q. I see—did you—have you—did you end up going down there for him or—

A. No, I didn't.

Q. Oh, I see—did anyone else, did—

A. I haven't the slightest idea.

Q. Did Mr. Gresham or—

A. No.

Q. Oh, do you know if he talked to Mr. Gresham at all.

A. No, he didn't.

Q. Oh, he didn't.

A. Uh-uh.

Q. Okay—well, Jim I really appreciate what you've told me now. Now as far as a bill for it, what kind of—how much do I owe you.

A. I'll just send you some kind of statement in the mail.

Q. Oh, all right.

A. I need the mailing address.

Q. All right. GAB Business Services.

A. Mm-hmm.

Q. Ah—620 North Craycroft.

A. Okay.

Q. Suite 207.

A. Mm-hmm.

Q. And the zip code over here is 85711.

A. Okay, what's your—what's the suite number.

Q. Suite 207.

A. 207. How do you spell your name.

Q. Okay, my name is Mike and the last name is Dotzauer—D O T—

A. Okay, I got the "Mike" but I didn't get the rest.

Q. Okay, D O T—

A. Uh-huh.

Q. Z A U

A. Z A U

Q. E R

A. E R—D O T.

Q. Yeah.

A. Okay.

Q. Yeah, D O T Z A U E R.

A. Okay. Thanks.

Q. And you're Jim Larson.

A. Uh-huh right.

Q. Thank you.

A. Sir, what are the circumstances here. Has this guy actually been sued.

Q. Ah—

A. Who is the architect-engineer.

Q. Bird—a guy by the name of Bird.

A. And where is he from.

Q. Let me see if I can figure out from this—ah—I'm not sure where he was, but, yeah, they did, they did file suit against him.

A. That's ridiculous.

Q. But that was like a year ago, or before that.

A. Was the—was the claim settled against him.

Q. Ah—if—I think the suit was dismissed on summary judgment. In other words, the suit against this Bird, but I'm not, you know, I can't say for positive.

A. There should have never been a law suit, because it's absolutely specious.

Q. It was absolutely what—

A. Specious.

Q. Specious. What does that mean.

A. Attorneys use the word and it's "without merit."

Q. Oh—

A. Only worse.

Q. Oh, I see. And how do you come to that—uh—conclusion.

A. Because the—the only possible design constraints that an engineer or an architect under those circumstances could possibly accommodate would be wind pressure and normal use, such as that. And he obviously did all of that because the thing hadn't blown over or fallen down.

Q. Mm-hmm, and this is what you told Elliott

A. M-hmm.

Q. Okay, well, whatever. All right, well, thanks a lot for your time.

A. I wish—wish you lots of luck. What's the eventual outcome on this, you know, I need to know a little bit more about you know, what's going on.

Q. Okay, really, I'm investigating on behalf of Bird, Bird's insurance carrier, I think, and I—to be honest with you, they just asked me to check a couple of specifics and they have an attorney and I'm kind of operating—doing what he tells me to do.

A. Okay, what are they doing—(skip in tape)—or the attorney that was involved—

Q. There—yeah—I got a—I got a—

A. —filing a counter-suit.

Q. I got a feeling they might be filing a counter-suit on Elliott, but I—you know, they didn't give me that information.

A. How did my name come up, was I—

Q. He gave a deposition. Elliott gave a deposition.

A. Uh-huh.

Q. And he mentioned, I think, your name and AIA and the Institute and

A. Uh-huh—

Q. And that's how it came up. He mentioned that he had checked with a number of architects in preparing his suit against Bird and that you were one of the architects he checked with. So I was checking with you to find out if you told him, you know, if you, whatever you told him.

A. What—who are the other architects he checked with.

Q. ah—he said—let me see. There's a guy by the name of Brent Davis.

A. Mm-hmm. Brent Davis is not an architect.

Q. Okay.

A. I want to make that quite clear.

Q. Okay. And then he said, James Gresham. But you have indicated that James—

A. Mm-hmm. James Gresham never talked to this guy.

Q. Okay.

A. I'm James Gresham's partner. That's probably why that name came up. It sounds like the attorney didn't have his information particularly straight.

Q. No.

A. By the sound of it. If I—if I'm being used, in the middle of this thing—

Q. Huh.

A. —and I'm being either incorrectly quoted or just being used against that architect or engineer, I want to be sure that this is straightened out immediately because I'm firmly on his side.

Q. Okay. Well, that's just real good to hear. If I don know—at this point I don't necessarily need a statement from you, but—

A. I'd like to know a little bit more about Elliott.

Q. Okay.

A. Where can I find him.

Q. Geez—Let me—

A. Like an address.

Q. I'll tell you what, let me do this. I'v got a number it's 884-8420. Let me give you my number.

A. Okay.

Q. It's 745-2300.

A. All right.

Q. Let me see if I can get familiar with this a little more and then I'll be glad to call you as soon as I find out what Elliott's name and address are—okay.

A. Okay—because if I've been improperly quoted—then it would seem to me that this architect-engineer and insurance company that's on his side and I can demonstrate that I've been improperly quoted well, then I think that would be of substantial interest.

Q. Oh, man, you're not kidding. Okay.

A. But, I'd like to see what he says.

Q. Okay, talk to you later.

A. Okay, thanks—bye.

END OF CONVERSATION

Appendix H

Court of Appeals, State of Arizona

Division Two

No. 2CA-CIV 3763
(Pima County Superior Court
Cause No. 173607)

James W. Bird, A.I.A.,
Plaintiff/Appellant,

v.

Samuel Rothman, an individual, James M. Elliott, an individual, and the Law Offices of Samuel Rothman and James M. Elliott, a partnership, and Does 1 through 10,
Defendants/Appellees.

[Filed Oct. 3, 1980]

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Plaintiff appeals from a directed verdict on Count I, malicious prosecution, ordered after both sides rested in a jury trial held January 15, 16 and 17, 1980, in Pima County Superior Court, Judge Collins presiding (RT. January 17, 1980, p. 255 and Item 57). Plaintiff further appeals from a summary judgment on Count II, negligence, and Count III, abuse of process, filed August 7, 1979 (Item 35), Judge Veliz presiding.

Final judgment on all three counts was entered April 17, 1980 (Item 57) and Plaintiff filed a timely notice of appeal on May 8, 1980 (Item 59).

This Court has jurisdiction pursuant to A.R.S. § 12-2101(B).

STATEMENT OF FACTS

James Bird is an architect, having practiced his profession for the last 25 years in 14 states, including Arizona, specializing in the design of race tracks. During that period he has been involved in the design of about twenty-six racetracks (RT. January 16, 1980, pp. 64-66).

His first project was in 1953 when he designed the Phoenix Greyhound Park (RT. January 16, 1980, p. 65).

He also designed the Amado Greyhound Park in 1963. At that time children were not allowed at the track (RT. January 16, 1980, p. 93). His design satisfied architectural standards for Arizona (RT. January 16, 1980, p. 92 and RT. January 15, 1980, pp. 130-135).

Thirteen years later, a complaint was filed by Samuel Rothman and James Elliott against American Greyhound Racing, Incorporated, alleging that a glass window was shattered at the Amado Park by a rock thrown by an unknown patron covering the plaintiff, Lucille Allen, with glass (RT. January 15, 1980, pp. 13-14 and Ex. 1).

The complaint was amended, adding James Bird and his wife as defendants alleging that they were negligent in the design of the Amado Greyhound Dog Track. The complaint was verified by Mr. Samuel Rothman (RT.

January 15, 1980, p. 17 and Ex. 3). Interestingly, Mr. Rothman later admits he had no specific evidence that a rock was thrown (RT. January 17, 1980, p. 71). James Elliott and Samuel Rothman prepared the complaint on behalf of Ms. Lucille Allen, acting as her attorneys, working jointly on the case (RT. January 15, 1980, p. 23; RT. January 16, 1980, pp. 199-201). Both men are admitted to the practice of law in Arizona (RT. January 16, 1980, p. 182 and RT. January 17, 1980, pp. 81-84). They handled Ms. Allen's case on a contingency fee basis (RT. January 16, 1980, p. 85).

The complaint was amended a second time (RT. January 15, 1980, p. 18 and Ex. 3), whereupon Mr. Richard L. Thompson, attorney for James Bird, filed a motion for more definite statement (RT. January 15, 1980, pp. 19-21 and Ex. 5). Thereafter a third amended complaint was filed by Messrs. Rothman and Elliott naming James Bird and Bennie Gonzales as defendants and incorporating by reference the allegations of the original complaint, the first amended complaint and the second amended complaint.

During the course of representing Mr. Bird, Mr. Thompson asked Mr. Rothman, "[what] is James Bird, a man who designed a race track fifteen years ago, doing in a lawsuit where a person throws a rock through a window?" Mr. Rothman responded: "Mr. Elliott got a hold of a bunch of names of people that had something to do with the construction and design of the racetrack, and we sued them all" (RT. January 15, 1980, pp. 20-22 and Ex. 6).

Since Mr. Thompson could find no facts to evidence negligence by Mr. Bird (RT. January 15, 1980, p. 19), he filed

a motion for summary judgment (RT. January 15, 1980, p. 23 and Ex. 8).

At the hearing on the motion for summary judgment, Mr. Elliott was asked by Judge Carruth if he had an affidavit to counter Mr. Bird's. In response, Mr. Elliott could not produce a counter-affidavit and opined that architects were "thicker than thieves" (RT. January 15, 1980, p. 63-64). Mr. Bird's motion for summary judgment was granted (RT. January 15, 1980, p. 64 and Ex. 12).

Summary judgment was also granted in favor of architect Bennie Gonzales (RT. January 17, 1980, p. 48 and Ex. 13). Mr. Rothman admitted he sued Mr. Gonzales despite the fact that Mr. Gonzales only designated the paint scheme and had nothing to do with the construction of the Amado Greyhound Park. Mr. Rothman opposed Mr. Gonzales' motion for summary judgment (RT. January 17, 1980, pp. 44-48). Mr. Rothman is not a qualified engineer or contractor (RT. January 17, 1980, p. 80).

Mr. Rothman admitted he may have handled only one other professional negligence case in his career, usually referring such cases to someone with expertise (RT. January 16, 1980, p. 212). He didn't consider himself qualified to handle such a case (RT. January 17, 1980, p. 51). He claims he sued Mr. Bird because there was a "possibility" that he had contributed to Ms. Allen's injuries (RT. January 16, 1980, pp. 213-214). Yet Rothman admits that he never knew if the glass specified by Mr. Bird was actually installed (RT. January 17, 1980, p. 49).

During the course of the suit against Mr. Bird, Mr. Rothman never obtained an opinion from an architect that Mr. Bird had been negligent (RT. January 17, 1980, p. 51).

In act, Mr. James Larsen, an architect practicing and teaching architecture in Ari ona (RT. January 15, 1980, pp. 126-127) had previously advised Mr. Elliott that in his opinion Mr. Bird had satisfied architectural standards at Amado Park and a suit against Mr. Bird was "out to lunch" (RT. January 15, 1980, pp. 130-135).

Mr. Rothman admitted that his file contains notes dated May 16, 1977, approximately the same time Mr. Bird filed his motion for summary judgment. The notes are Mr. Elliott's, who relaied their substance to Mr. Rothman. In part the notes state:

> "look up the building code; research architects, engineers professional responsibilities; mere existence of window and seats does not contribute to plaintiff's injuries; must find architect who will testify and give affidavit concerning installation of glass equals negligence." (RT. January 17, 1980, pp. 62-64).

Mr. Elliott admits Mr. Larsen advised him that Mr. Bird had not deviated from any standard (RT. January 17, 1980, p. 108).

Mr. Elliott did not try to pinpoint Mr. Bird's liability when he sued him. He only looked for facts which would exclude Mr. Bird definitely . . . not finding that he sued him (RT. January 17, 1980, p. 135). He did not consult an architect before suing Mr. Bird to evaluate the plans and specificat ons for Amado G yhound Park (R.T. January 17, 1980, pp. 135-136; RT. January 17, 1980, p. 142).

He sued the installer of the glass simply on the basis he had installed the glass (RT. January 17, 1980, pp. 136-137). He is unable to say whether he would sue an architect for damages caused by a jet plane flying into a window and shattering the glass (RT. January 17, 1980, p. 148). He acknowledges he would have sued Mr. Bird for failure to erect a shield if Mr. Bird had not specified any glass at all and a rock was thrown injuring Ms. Allen (RT. January 17, 1980, pp. 141-142). To this day Mr. Elliott doesn't even know what glass was installed (RT. January 17, 1980, pp. 150-151).

Mr. Richard Thompson, an Arizona attorney, represented Mr. Bird throughout the underlying case. Additionally, he visited the Amado Park on more than one occasion to evaluate the case. Mr. Jack Cavness is an Arizona attorney. Both Mr. Thompson and Mr. Cavness opined that Messrs. Elliott and Rothman's investigation of the facts and research of the law in this case fell below the standard of care for an attorney in Arizona. Mr. Thompson also opined that seeking a default judgment as Mr. Elliott had for Mr. Bird's failure to appear for a deposition which Elliott had never noticed is below the standard of practice for Arizona attorneys. The trial court noted that this evidence was irrelevant and immaterial to the issues of malice and probable cause (RT. January 15, 1980, p. 64 and pp. 87-123).

As a consequence of Mr. Elliott and Mr. Rothman's having sued him, Mr. Bird spent approximately $4,482.33 in attorney's fees (RT. January 15, 1980, p. 72; RT. January 16, 1980, p. 67). In addition, he spent about forty hours

assisting counsel in his defense. Ordinarily he charges $50 per hour for his time. His partners also assisted. Mr. Bird suffered frustration, anger, loss of sleep, indigestion and headache (RT. January 16, 1980, pp. 67-70).

ISSUES PRESENTED

I

In a malicious prosecution case, are the state of mind of the attorneys and the reasonableness of their investigation and research of law factual issues to be determined by a jury before the court can rule on the issue of probable cause?

II

In a malicious prosecution case, should expert opinion on the plaintiff's attorneys' investigation of facts and research of law be admitted into evidence to allow the trier of fact to decide if such investigation and research were reasonable?

III

Are attorneys in Arizona immune from liability to adverse parties for negligently instituting or continuing groundless lawsuits?

ARGUMENT

I

Since reasonable minds could differ as to (a) the state of mind of defendants and (b) the reasonableness of their investigation of facts and research of the law, the court could not find probable cause as a matter of law until the underlying conflicts were first resolved by the trier of fact with the aid of expert testimony.

Arizona recognizes an action for malicious prosecution of civil proceedings. *Ackerman v. Kaufman*, 41 Ariz. 110, 15 P.2d 966 (1932). The elements of the action are:

(1) institution *or* a continuation of proceedings without probable cause;

(2) the proceedings must have been instituted or continued with malice;

(3) the proceedings must have terminated in favor of the person against whom they were brought. See Restatement of Torts 2d § 674(c); *Ackerman v. Kaufman, supra; Watzek v. Walker*, 14 Ariz.App. 545, 485 P.2d 3 at 6 (1971); *McLinton v. Rice*, 76 Ariz. 358, 265 P.2d 425 at 431 (1953); *Visco v. First Natl. Bank of Ariz.*, 3 Ariz.App. 504 at 507, 415 P.2d 902 (1966); *Joseph, M.D. v. Markovitz, M.D.*, 27 Ariz.App. 122, 551 P.2d at 573 (1976).

Although some jurisdictions follow the "English rule" requiring arrest, direct interference with property or some other "special injury" as an element of the tort, Arizona follows the enlightened majority which has adopted the "American rule" recognizing attorney's fees as sufficient damage to sustain the claim. *Ackerman v. Kaufman, supra;* for a comprehensive discussion of this element see *O'Toole, M.D. v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977); concerning the award of attorney's fees as damages, see *Bertero v. National General Corp.*, 13 Cal.3d 43, 118 Cal. Rptr. 184, 529 P.2d 608, 65 A.L.R.3d 878 (1974, modified on denial of rehearing January 29, 1975); see also Restatement of Torts 2d § 681.

There is no dispute in the record that the underlying case was terminated in Mr. Bird's favor by Judge Carruth's granting of Mr. Bird's motion for summary judgment. Likewise there is no dispute that Mr. Bird incurred approximately $4,000 in attorney's fees to defend the underlying case. Additionally, Mr. Bird testified he suffered other damages, including physical discomfort. Whether the facts in a particular case are sufficient to constitute probable cause is a question of law to be determined by a reasonable man test. That is, upon the appearances presented to the defendant, would a reasonably prudent man have instituted or continued the proceeding. *Carroll v. Kalar*, 112 Ariz. 595 at 596 (1976) citing *McLinton v. Rice, supra.*

Both the plaintiff *and* his attorney are liable for malicious prosecution if the elements of the cause of action are met. *Carroll v. Kalar, supra.*

A California court illuminates the attorney responsibility as follows:

> "An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious research of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried [citations]. The test is twofold. The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard." *Tool Research & Engineering Corp. v. Henigson*, 46 Cal.App. 3d 675 at 683, 120 Cal.Rptr. 291 at 297 (1975).

True, the attorney has a duty to represent his client zealously. However, should he abuse that duty by prose-

cuting a claim which a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to proceed, he exposes himself to liability for malicious prosecution. *Tool Research & Engineering Corp. v. Henigson, supra*, 46 Cal. App.3d 675 at 683, 684, 120 Cal.Rptr. 291 at 297.

The role of court and jury on the issues of probable cause and malice was explained in an early decision of the Arizona Supreme Court as follows:

> "If the facts are in dispute, the court by its charge should say what facts found by the jury will constitute probable cause. Malice is for the jury. They may find the element of malice from the want of probable cause, but not necessarily. The burden is on the plaintiff to prove, by a preponderance of evidence, both malice and a want of probable cause. These principles have been so long and so deeply settled as to be unquestioned." *Murphy v. Russell*, 40 Ariz. 109, 9 P.2d 1020 at 1021 (1932).
>
> • • • •
>
> "There are two methods whereby the court and jury can respectively discharge their proper functions in this respect. The first, and perhaps the surer, is by the court's submitting a special verdict to the jury and then applying the law to the facts so found [citations]. The second, and probably the commoner, method is for the court, by means of a hypothetical instruction, to group the facts which the evidence tends to prove, and then instruct the jury that, if they find one set of facts to have been established, they should find that there is probable cause, while, if they find the other, they should find there is not [citations]. *Murphy v. Russell, supra*, 9 P.2d 1020 at 1021, 1022.

In the instant case, the court refused to give such an instruction, thereby depriving the plaintiff James Bird of his right to have a jury decide the defendants' state of mind and the reasonableness of the investigation. As the court in *Carroll* points out:

> "This state of mind has been held to ordinarily be a question for the jury [citations]." *Carroll v. Kalar, supra*, 112 Ariz. 595 at 599.

In order to direct a verdict as it did, it was necessary for the trial court to arbitrarily decide that the defendants honestly believed they had a tenable claim against Mr. Bird. Such a decision flies in the face of the evidence. Defendants could never articulate the basis of Mr. Bird's alleged liability. They sued him because he was the architect and there was a "possibility" he was liable, notwithstanding they are not qualified engineers nor had they obtained any architectural expert testimony to support a suit against Mr. Bird.

Moreover, how could the trial court determine as a matter of law that defendants' investigation and research were reasonable? Only qualified attorneys who had reviewed the defendants' entire file and the court file in the underlying case, including depositions, could determine if defendants' efforts were reasonable. The trial court rejected the opinions of Mr. Cavness and Mr. Thompson on this issue. On the contrary, the jury should have been given the opportunity to decide these factual underpinnings of probable cause, i.e., defendants' state of mind and reasonableness of investigation, with the aid of expert testimony.

Directed verdicts are restricted in Arizona to those cases where reasonable minds cannot differ as to the conclusions which must be drawn. *Lancaster v. Chemi-Cote Perlite Corp.*, 20 Ariz.App. 229, 511 P.2d 673 (1973).

> "It is well settled that a motion for a directed verdict admits the truth of all competent evidence introduced by the party opposing the motion, including all reasonable inferences to be drawn therefrom. Such evidence must be viewed most strongly against the movant and most favorably for the opposition. If, considering all the facts and circumstances, there is a reasonable likelihood that reasonable men may reach different conclusions, the question of fact in issue is to be decided by the jury." *Smith v. Chapman*, 115 Ariz. 211, 564 P.2d 900 at 904 (1977), citing *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 268, 550 P.2d 1065 at 1069 (1976).

Certainly, reasonable men could conclude that defendants did not have an honest *and* reasonable belief their claim was tenable: they were not qualified architects or engineers themselves; they usually referred these kinds of cases to attorneys with expertise; the only architect they consulted prior to filing suit told them there was no basis for a claim; they told Mr. Thompson they sued anyone who had anything to do with the design or construction of Amado Park (this included the architect who specified the paint scheme); they advised Judge Carruth at the summary judgment hearing that they had no evidence to contradict Mr. Bird's affidavit; they arbitrarily asserted that architects were "thicker than thieves"; they have no idea if the glass which injured Ms. Allen was the glass specified by Mr. Bird, nor do they know if the glass which was speci-

fied was actually installed; they verified a complaint stating a rock was thrown shattering a window but at the trial denied that they knew this to be true; they had not sought expert opinions or done legal research on architects' liability until Mr. Bird moved for summary judgment; notwithstanding their inability to obtain an opinion to support their claim or present legal authority to Judge Carruth which would allow the case to continue, they sought a default judgment against Mr. Bird for failure to appear at a deposition when in fact they had never noticed his deposition. In sum, the record is replete with evidence from which reasonable men could conclude that defendants had not conducted a reasonable investigation and consequently could not have an honest *and* reasonable belief in their action against Mr. Bird.

Due to the trial court's ruling on probable cause, the issue of malice was never decided. Suffice it to say that malice is a question of fact for the jury and may be inferred from a lack of probable cause. *Murphy v. Russell, supra*, 9 P.2d 1020 at 1021, *Masterson v. Pig n' Whistle Corp.*, 161 Cal.App.2d 323, 326 P.2d 918 at 928 (1958). An appellate court has determined that malice clearly exists where circumstances are found in the evidence showing defendants' lack of good faith in seeking a default judgment. *Munson v. Linnick*, 255 Cal.App.2d 589 at 596, 63 Cal.Rptr. 340 at 344 (1967). Defendants herein verified a complaint, later admitting they did not know the facts alleged to be true, i.e., that a rock was thrown shattering the window. A verification is an affidavit of the truth of the matters stated. Its object is to insure good faith in the averments or statements of a party. Verification of state-

ments not known to be true may show bad faith on the part of the person verifying, if he is later sued for malicious prosecution. *Albertson v. Raboff*, 185 Cal.App.2d 372 at 387, 388 (1960).

Malice means that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose. It does not necessarily require that the defendant be angry or vindictive or bear any actual hostility or ill will toward the plaintiff. It may be proved by direct evidence or it may be inferred from circumstances such as evidence of lack of probable cause, or the defendants' bad faith, or the absence of an honest and sincere belief by the defendant that the prosecution of the plaintiff was justified by the existing facts and circumstances. See e.g. California Jury Instructions § 6.94, West Publishing Co. (1977) and *Murphy v. Russell, supra*; see also 54 C.J.S. Malicious Prosecution § 43; Witkin Summary of California Law, Torts § 253, Restatement of Torts 2d § 668.

Herein the defendants voiced to a court of law that architects were "thicker than thieves". They also told opposing counsel they sued anyone who had anything to do with the construction or design. The implication is this was a malicious, nuisance, groundless, shotgun lawsuit designed to force a settlement by making defendants share the cost rather than each defendant bearing the expense of defending.

As one author writes:

> "Regardless of the theory on which a court relies to find malice, a close factual analysis of the cases suggests that malice is almost always found from the same facts as those which establish lack of probable cause."

See comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 Pac.L.J. 897, 904 (1977)

The Restatement of Torts 2d summarizes by saying:

> "Malicious prosecution occurs when the proceedings are initiated for the purpose of forcing a settlement that has no relation to the merits of the claim. This occurs, for example, when a plaintiff, knowing that there is no real chance of successful prosecution of a claim, brings a 'nuisance suit' upon it for the purpose of forcing the defendant to pay a sum of money in order to avoid the financial and other burdens that a defense against it would put upon him." Restatement of Torts 2d § 676, comment (c).

Accordingly, the trial court erred in directing a verdict for defendants by finding that probable cause existed without first resolving the factual issues underlying this element. The jury was entitled to decide if defendants honestly believed in their case and whether they conducted a reasonable investigation of facts and law. Then, and only then, could the court decide the issue of probable cause. The instructions outlined in the *Murphy* case make this clear. *Murphy v. Russell, supra.*

II

Public policy and equal rights under law dictate that Arizona recognize a cause of action by adverse parties against attorneys who negligently prosecute groundless lawsuits

The trial court entered summary judgment on the second count of plaintiff's complaint, which charged defendants

with negligently investigating and researching their case, thereby damaging plaintiff by forcing him to defend a groundless lawsuit. In entering that judgment the trial court stated:

> "as a matter of law there is no duty owed by a lawyer to an adverse party." See Item 34.

A summary judgment is properly granted only if it is established that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Luplow v. Pasqualetti Properties, Inc.*, 101 Ariz. 90, 416 P.2d 414 (1966). In reviewing the granting of a motion for summary judgment, the facts of the case must be viewed in a light most favorable to the party against whom the motion was granted. *Riedisser v. Nelson*, 111 Ariz. 542, 534 P.2d 1052 (1975).

Since the issue of an attorney's duty to an adverse party for negligence has never been squarely decided in Arizona, the trial court did not have the benefit of precedent to guide it.

Admittedly, several jurisdictions have restricted an adverse party's right of recovery against an attorney to actions for malicious prosecution and abuse of process. See e.g. *Lyddon v. Shaw*, 56 Ill.App.3d 815, 372 N.E.2d 685 (1978); *Hill v. Willmott*, 561 S.W.2d 331 (Ky.App. 1978); *Spencer v. Burglass*, 337 So.2d 596 (L.A. Court of Appeal 1976); *Bickle v. Mackie*, 447 F.Supp. 1376; *Brody v. Ruby*, 267 N.W.2d 902; *Pantone v. Demos*, 375 N.E.2d 480; *Berlin v. Nathan*, 381 N.E.2d 1367; *Friedman v. Dozorc*, 268 N.W. 2d 673; *Drago v. Buonagurio*, 391 N.Y.S.2d 61; *Mann v. Showalter*, 145 Ga. 268, 88 S.E. 968 (1916); *Farmer v. Crosby*,

43 Minn. 459, 45 N.W. 866 (1890); *Bryan & Amidei v. Lau*, 435 S.W.2d 587 (Tex. Civ. App. 1968); *Sachs v. Levy*, 216 F.Supp. 44 (E.D.Pa. 1963); *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 651 (1977); *Thomas Fruit Co. v. Levergood*, 135 Okla. 105, 274 P.471 (1929); *Lackey v. Vickery*, 57 F.Supp. 791 (W.D. Mo. 1944); *Weaver v. Superior Court*, 95 Cal.App.3d 166, 156 Cal.Rptr. 745 (1979). Generally speaking, the analysis in these opinions is usually superficial and flawed.

Any analysis of duty begins with the evaluation of policy considerations to determine if the plaintiff's interests are entitled to legal protection against the defendant's conduct. This is true of *Palsgraf* and its progeny. *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339 (1928). Most recently the California Supreme Court stated the test more explicitly:

> " . . . the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16 (1958).

The Arizona Court of Appeals, Division Two, adopted this test verbatim in *Fickett v. Superior Court of Pima County*, 27 Ariz.App. 793, 558 P.2d 988 at 990 (1976). In *Fickett*, a conservator of an incompetent's estate brought

an action against a former guardian and the attorneys for the former guardian, alleging that the attorneys were negligent in failing to discover that the guardian had embarked upon a scheme of misappropriation, conversion and improper investment. The attorneys sought summary judgment, which was denied, and challenged the denial by special action. The Court denied their petition and stated:

> "We believe that the public policy of this state permits the imposition of a duty under the circumstances presented here." *Fickett, supra*, 27 Ariz.App. 793, 558 P.2d 988 at 990.

Applying the test of *Biakanja* and *Fickett* to the case at bar compels the conclusion that defendants owed plaintiff a duty of due care in investigating, initiating and continuing their lawsuit against him. Unquestionably their lawsuit was intended to affect Mr. Bird. They were seeking to recover money from him, or at the very least to force him to defend a lawsuit. Forseeably this could harm him financially, physically, and emotionally, if not professionally. To a certainty, Mr. Bird logically suffered such injury. But for the defendants' actions this never would have happened. In doing so, they violated standards of practice, sought a default without grounds and swore to the truth of matters they did not know to be true. To make these defendants and others similarly situated in the future answerable for such conduct promotes a policy of preventing future harm to innocent victims of spurious litigation.

The principal argument against creating an attorney's duty of care toward adversaries is it will subvert the public policy of favoring free access to the courts. *Nor-*

ton v. Hines, 49 Cal.App.3d 917 at 923, 123 Cal.Rptr. 237 at 241 (1975); see also *Lyddon v. Shaw*, *Hill v. Willmott* and *Spencer v. Burglass*, *supra*. This ignores the countervailing policy of favoring protection of individuals from involvement in groundless litigation. Creating a duty of reasonableness in these cases would encourage preliminary investigation and research which in turn would improve the quality of the profession and raise the caliber of representation. It would reduce congestion of the court's calendar which could be reflected in the cost of filing and prosecuting lawsuits. It would also reduce the cost of malpractice insurance by placing the premium for failure to investigate on the plaintiff's attorney rather than the innocent professional who is unjustifiably sued. Society would benefit, since insurance dollars would be funneled toward paying losses rather than paying the cost of defense.

Opponents of the duty also urge that the mere threat of a countersuit for negligence would impair the ability of the attorney to represent his client. In fact, they agree, it creates the potential that an attorney may have a conflict of interest with his client. This conflict is generated, they assert, by the attorney's temptation to blame his client for any wrongdoing and to disclose confidences necessary for self-defense. See Comment, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L.J. 387 at 389 (1978). Such reasoning is shortsighted. If the attorney has done his homework, then his interest and the client's are the same . . . to diligently prosecute the case to its conclusion or settlement, whichever occurs first. If the attorney does not share this interest with his client he should not undertake to represent him. To accept the case,

believing it lacks probable cause, is a disservice to the client and may constitute malicious prosecution of the defendant if the other elements occur, such as favorable termination.

Perhaps these commentators are suggesting the anxiety level of plaintiffs' attorneys in a "negligence" jurisdiction would be unbearably greater than that of the plaintiffs' attorneys in "malicious prosecution only" jurisdictions.

Those opposing the duty of due care also argue that countersuits for negligence would expose the attorney's work product to discovery, yet we know of no such exception to the work product privilege. Nor do we find any reported case which implies a waiver of this privilege in the event of a countersuit for negligence. On the contrary, in malicious prosecution cases, the attorney's work product on the underlying case has been held to be privileged despite the fact that the underlying case has terminated. *Popelka, Allard, McCowan & Jones v. H. Coster*, 165 Cal. Rptr. 748 (1980); *Fellows v. Superior Court*, 166 Cal.Rptr. 274 (1980). It appears the opponents of a rule imposing a duty on attorneys to use reasonable care in suing adversaries have created specious arguments in an effort to carve out an immunity for themselves.

These same spokesmen have successfully created a legal duty of due care to third parties in virtually every profession other than law. See e.g.: *Hoffman v. Blackman*, 241 So. 2d 752 (1970) and *Freese v. Lemmon*, 210 N.W.2d 576 (1973) [physicians]; *Tarasoff v. Regents of University of Calif.*, 17 C.3d 425 (1976) [psychiatrist]; *Duro Sportswear v. Cogen*, 131 N.Y.S.2d 20 (1954) [accountants]; *Dickel*

v. Nashville Abstract Co., 145 S.W. 896 (1890) [abstractor]; *Lowe v. Wright*, 292 S.W.2d 413 (1956) [notary]; *Montijo v. Swift*, 219 Cal.App. 351 (1963) [architects]; *Hanna v. Fletcher*, 231 F.2d 469 (1969) and *Pastorelli v. Associate Engineers Inc.*, 176 F.Supp. 159 (1959) [engineers]; *Kent v. Bartlett*, 49 Cal.App.3d 724 (1975) [surveyor]; *Granberg v. Turnham*, 161 C.A.2d 390 (1958) [real estate broker]; *Sun & Sand, Inc. v. United California Bank*, 21 C.3d 671 (1978) [bank]; *Glanzer v. Shepard*, 233 N.Y. 236 (1922) [weighmaster]. In sum, attorneys are unwilling to practice what they preach, i.e., third party liability for negligence.

In light of the relaxation of privity requirements in these areas and others, such as products cases (see e.g. *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. at 276 (1916)), it is an obvious discrimination to give lawyers preferred treatment. The test of duty outlined in *Biakanja* and *Fickett, supra,* supersedes any argument favoring privity as a prerequisite to duty.

As one analyst puts it:

> "No profession uses balancing tests more skillfully than ours, and there is no reason to believe that the courts cannot find the proper balance between compensating those who deserve it on the one hand and protecting the freedom of the attorney to prosecute his client's case diligently, zealously and effectively on the other hand." Negligence Law Newsletter, Vol. 1, No. 4, p. 4, Ohio State Bar Association, Columbus, Ohio (April 1978)

In light of the expansion of third party liability for all professionals, the Arizona public policy test for duty

espoused in *Fickett* and the flood of groundless lawsuits (see, *The Wall Street Journal*, August 15, 1980, p.34; 70,000 malpractice actions in five years), Arizona should adopt a rule establishing the liability of lawyers to their adversaries for negligent investigation and prosecution of suits.

III

The record contains facts from which reasonable men could conclude that defendants had an ulterior purpose in suing Mr. Bird, consequently summary judgment on the abuse of process count should have been denied

The test for granting a summary judgment has been stated above. If there is any issue of material fact summary judgment is not appropriate. The trial court found no evidence of this tort and granted summary judgment for defendants on that basis (Item 34).

The court in *Joseph v. Markovitz, supra,* 27 Ariz.App. 122, 551 P.2d 571 at 574 (1976) defines abuse of process:

> "Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish."
>
> • • • • • •
>
> "The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no

> liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Joseph v. Markovitz, supra,* 551 P.2d 571 at 574, 575 citing Prosser, Law of Torts.

If direct evidence, such as an admission were necessary to sustain a cause of action for abuse of process, it is unlikely the claim would ever be proven.

Ulterior purposes are ensconced in the minds of wrongdoers and most often are shown only through circumstantial evidence.

The primary purpose of filing and serving a summons and complaint is to obtain jurisdiction over a party and secure a judgment or compromise settlement based on the merits of the case.

Occasionally, attorneys will file "shotgun" lawsuits naming numerous defendants, never intending to acquire a judgment or settlement relative to the merits of the claim. Rather, their purpose is to force the several defendants to pool their funds and pay plaintiff his demand rather than each defendant bearing the cost of a defense.

We assert that such a purpose is ulterior to the intended function of a summons and complaint.

In the instant case, such ulterior purpose was circumstantially evident from the following facts offered at the hearing on the motion for summary judgment:

> 1. In a telephone conversation on July 20, 1976, Mr. Rothman told Mr. Thompson that Mr. Bird was named as a defendant because he had something to

do with the track and they just sued everyone. Mr. Thompson characterized the case as a shotgun law suit. (Items 30, 31, and 27).

2. Mr. Elliott felt it might be incumbent upon him to sue the architect in a case where a jet plane flies into a high-rise building shattering the glass and injuring the occupants. (Items 38, 31, and 27).

3. Mr. Elliott felt he owed no duty to Mr. Bird to investigate the case before filing suit and he did not conduct a reasonable investigation (Items 30, 31 and 27).

Consequently, the court's order concerning abuse of process is in error and appellant should be given the opportunity to argue his case to a jury.

CONCLUSION

It is respectfully requested that this Court reverse the judgment entered April 17, 1980 (Item 57) and remand all counts of this action to the trial court for trial by jury. It is further requested this Court instruct the trial court to allow expert testimony on the reasonableness of defendants' conduct and grant the jury the right to decide the state of mind of defendants and the reasonableness of their investigation of facts and law.

DATED: September 30, 1980.

Maurer, Higginbotham & Harris

By Charles D. Maurer, Jr.

Charles D. Maurer, Jr.

Appendix I

Court of Appeals, State of Arizona

Division Two

No. 2CA-CIV 3763
(Pima County Superior Court
Cause No. 173607)

James W. Bird, A.I.A.,
Plaintiff/Appellant,

v.

Samuel Rothman, an individual, James M. Elliott, an individual, and the Law Offices of Samuel Rothman and James M. Elliott, a partnership, and Does 1 through 10,
Defendants/Appellees.

APPELLANT'S REPLY BRIEF

INTRODUCTION

Sue a physician for negligently performing surgery, and jurors will decide his fate where facts are at issue. Sue an architect for negligently designing a structure, again the jury will determine whether his conduct was reasonable. But sue the lawyer who through his confessed lack of ability, research and investigation wrongfully sued you, and you are *de facto* denied the opportunity to present your case to a jury.

This, respondents say, is the law. They tell us no matter how reprehensible an attorney's conduct toward his adver-

sary, redress shall be restricted to malicious prosecution with its keystone of probable cause remaining the exclusive, all-inclusive, province of the judge.

This position portends two inequities incongruous with a constitutional form of government:

(1) Lawyers shall receive special treatment in the courts when charged with irresponsible conduct.

(2) Arizona will favor the indiscriminately cavalier lawyer over his injured victim.

Such policy is discriminatory on its face. It ignores the right to be free from unfounded litigation. Moreover, it encourages the proliferation of groundless lawsuits and allows the egregious, if not pernicious, practices of the prosecuting lawyer to escape the scrutiny of a jury.

For this court to tell appellant he cannot sue respondents for negligence acknowledges that he and his fellow professionals have fewer rights than attorneys. To admit this obvious discrimination and endorse it in support of a policy favoring free access to the courts overlooks its effect on appellant's access to those same courts.

However, respondents argue, appellant may sue for malicious prosecution, but the trial judge, *alone,* will decide if the defendant's conduct was acceptable. This decision is the determination of probable cause. Included under its umbrella are:

(1) The defendant's state of mind;

(2) The reasonableness of defendant's investigation of facts;

(3) The reasonableness of defendant's research of the law.

Respondents would have us believe the trial judge will make the determination of probable cause without jury assistance, even in cases such as that at bar, where all the underpinnings of probable cause were in factual dispute.

If any of the three elements of probable cause is disputed and the trial court makes the determination of probable cause without allowing the jury to resolve the disputes over its elements, it has committed error by deciding that "reasonable minds could not differ" on an issue where they clearly differed.

The record is replete with evidence of conspicuously unreasonable, unprofessional, and malicious conduct by respondents. To designate these actions as "simply negligence" for which appellant has no right of countersuit only breeds contempt for the judiciary, unless all the policies which counter the blanket, one-sided policy of respondents' "free access to the courts" are addressed and overridden.

Additionally, appellant never truly received a jury trial and no one similarly situated ever will obtain the benefit of a jury if this court approves the trial court's directed verdict. Even a plaintiff's attorney who confesses he is unqualified will be immune from countersuit. How can counsel *"reasonably"* believe he has a tenable claim if he is unqualified to make that judgment?

To affirm the trial court's decision is to abolish the established test for a directed verdict. Reasonable minds could come to a conclusion different from the trial court

on the underpinnings of probable cause. In fact, they did, as evidenced by the expert testimony which was offered.

ARGUMENT

I

The record below contains sufficient evidence to require that the jury determine the factual issues of defendants' state of mind and the reasonableness of their research and investigation

After three days of testimony, the trial court took appellant's malicious prosecution action from the jury, directing a verdict in favor of respondents. In doing so, the court determined that reasonable minds could not differ on the respondents' state of mind and the reasonableness of their investigation and research. The issues of respondents' state of mind and whether their preparation satisfies acceptable standards to invoke the test of probable cause must be decided by a jury.

> "This state of mind has been held to be ordinarily a question for the jury [citations]." *Carroll v. Kalar*, 112 Ariz. 595 at 599, 545 P.2d 411 (1976).

> "What is reasonable and what is unreasonable in terms of the attorney's pre-filing investigation is a question of fact; the legal determination of probable cause or the lack of it arises from whatever is found on the factual issues." *Weaver v. Superior Court*, 95 Cal. App.3d 166 at 192, 156 Cal.Rptr. 745 at 760 (1979).

It is well-settled in Arizona that a motion for a directed verdict admits the truth of competent evidence opposing the motion and construes such evidence "most strongly against the movant and most favorably for the opposi-

tion", *Smith v. Chapman,* 115 Ariz. 211, 564 P.2d 900 at 904 (1977). Similarly, on review of a directed verdict, the Court of Appeal must consider the evidence and all reasonable inferences therefrom in the light most favorable to the opposing party. *Jackson v. H. H. Robertson Co., Inc.,* 118 Ariz. 29, 574 P.2d 822 at 824 (1978).

It is respectfully submitted that this Court must find that the evidence, especially when construed in favor of the plaintiff and against defendants, supports the inference that defendants' state of mind and degree of preparation were issues for the jury to decide.

II

Expert testimony as to defendants' investigation and research should have been admitted

In order to direct a verdict as it did, it was necessary for the trial court to decide that defendants had conducted reasonable research and investigation from which they could honestly and reasonably believe they had a tenable claim against plaintiff. Not only does this decision fly in the face of the evidence, it was made without the benefit of testimony from anyone who had reviewed the attorneys' files, could testify as to what research and investigation had, in fact, been performed, and was qualified to give an opinion as to whether or not such research and investigation was reasonable. Plaintiff offered this evidence through expert testimony, but the court rejected it.

Respondents assert that *Carroll v. Kalar, supra,* prohibited this expert testimony. Nowhere in *Carroll* does it say that an attorney expert witness may not review the

file and testify as to the actual investigation and research performed, nor is it stated therein that expert opinion on the appropriate standard of research or investigation is inadmissible. Who could provide better proof of the reasonableness of respondents' conduct than a fellow attorney litigating the underlying case?

Whether or not defendants acted with probable cause necessarily depends on their state of mind and degree of preparation. With the burden of proof on plaintiff to prove lack of probable cause, the trial court made it impossible for him to do so. Defendants had the opportunity to testify that they acted with probable cause, but plaintiff was denied an opportunity of presenting expert testimony to counter the defendants or to show how the actual file indicated inadequate research and investigation. This made the trial completely one-sided.

III

To allow the jury to decide a defendant's state of mind and degree of preparation will not invade the province of the court, or replace the tort of malicious prosecution with negligent concepts

Respondents state in their Answering Brief at page 15:

> "Variously, in his Opening Brief, plaintiff comments on the alleged prosecution of the Lucille Allen action against various of the defendants, including the present plaintiff, Bird, as having been based upon inadequate investigation and research. As mentioned above, this is a matter which falls within the confines of plaintiff's negligence theory, now outlawed by the Arizona Appellate Court."

Apparently, respondents contend that appellant's position would make liability for negligence and liability for malicious prosecution virtually indistinguishable because a component common to both determinations is proof that a defendant acted unreasonably. Clearly, the degree of blameworthiness which must be proved to prevail as a plaintiff in a malicious prosecution case is significantly greater than that required to prevail in a case alleging only negligence. Reasonableness of a defendant attorney's conduct constitutes the very essence of liability in a negligence case. In a malicious prosecution action, the reasonableness of defendant's conduct bears on the issue of probable cause but two additional elements are also necessary. A plaintiff must establish that the prior civil action was terminated in his favor and show by a preponderance of evidence that the defendant acted maliciously.

A California court, when confronted with this same argument, dismissed it as follows:

> "As a consequence, it always remains a possibility that unreasonable behavior in terms of the nature of the pre-filing behavior of the attorney, even though it would support a conclusion that there was no probable cause to file, would nevertheless not support an inference of malice."
>
> • • • • •
>
> "It follows, therefore, that the quantum of culpable conduct which must be proved to prevail as a plaintiff in a malicious prosecution case is *significantly greater* than that required to prevail in a case alleging only negligence. For this reason we have concluded that petitioner's contention that our decision makes liability

for negligence and malicious prosecution 'virtually indistinguishable' is actually specious and hence without merit." *Weaver v. Superior Court, supra* at 760.

IV

Any public policy which favors attorneys over other classes of litigants should not be supported

Respondents emphasize again and again the quandary of the plaintiff's attorney who must weigh the risk of personal liability against representing a client whose claim may prove to be groundless. They argue that this Appeals Court should uphold the rulings below on the grounds of a clearly articulated public policy that free access to the courts must not be blocked by encouraging lawsuits against attorneys who prosecute doubtful claims.

However, the trend in malicious prosecution law is not as clear as respondents would have this Court believe. A majority of jurisdictions, including Arizona, have now dropped the requirement that a plaintiff must suffer arrest or seizure of property before a cause of action for malicious prosecution can be stated. See *Ackerman v. Kaufman*, 41 Ariz. 110, 15 P.2d 966 (1932); *O'Toole, M.D. v Franklin*, 279 Or. 513, 569 P.2d 561 at 564, n. 3, 4 (1977). Two jurisdictions have recently dropped the requirement that the prior case must have terminated in the plaintiff's favor and now permit the filing of a counterclaim for malicious prosecution and abuse of process in the same action. See Revised Code of Washington Annotated, Section 4-24.350 (Supp. 1980), and Tennessee Code Annotated, Section 23-3415(b)(Cum. Supp., 1976). These developments do not appear to have inhibited access to the courts. There is a simple explanation: Exposure of plaintiffs' attorneys

to a countersuit arises only when *no reasonable* degree of merit for their action is discernable. The qualified lawyer, performing professional preparation, is not discouraged from bringing suit regardless of how subtle his proof.

California now requires that a certificate must be executed by the plaintiff's attorney prior to filing and service of an action against an architect, engineer, or surveyor based on professional negligence. See California Code of Civil Procedure, Section 411.35. The attorney must certify that he has consulted with at least one licensed architect, engineer, or surveyor and "has concluded on the basis of such review and consultation that there is a reasonable and meritorious cause for the filing of such action". Alternatively, the attorney must certify that he has contacted three such professionals and none agreed to a consultation.

But even these developments in the law have not made it easier for a professional who has been sued for malpractice on a meritless claim to recover against the plaintiff's attorney. For example, although it is notoriously difficult to obtain summary judgments or directed verdicts in most cases, this does not appear to constrain rulings favoring attorneys in malicious prosecution actions. Expert testimony is admissible in a malpractice action against an architect, but defendants claim that it should not be admissible in a malicious prosecution action against an attorney. The reasonable person standard of care is traditionally applied by the jury in malpractice actions, whereas in malicious prosecution actions, defendants state, the

reasonableness of the attorney's belief in the claim is for the judge to decide.

The reason the policy favoring free access to courts cannot support the directed verdict or summary judgments below is obvious. First, the application of this policy results in virtual blanket immunity for careless plaintiff's attorneys, does nothing toward raising the caliber of legal representation, congests the courts, inflates malpractice insurance premiums, and increases the cost of business generally. Second, appellant should not have been denied his right to a trial by jury because of any policy favoring attorneys over other classes of professionals. Appellant, and other victims of meritless lawsuits, would lose more basic rights protected by the Arizona and United States Constitutions:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . ." Seventh Amendment, United States Constitution
>
> • • • • •
>
> "The right to trial by jury shall remain inviolate." Article 2, Section 23, Arizona Constitution.
>
> • • • • •
>
> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment, Section 1, United States Constitution.

Inequity in its purest form imposes the burden of defending a groundless lawsuit upon an architect and takes away his opportunity to recover the costs of defense in order

that attorneys may be free to prosecute doubtful claims. The paternalistic attitude of the courts toward attorneys is irrational, unconstitutional, and in contravention of traditional notions of justice and fair play.

V

Chalpin and *Lewis* do not control disposition of plaintiff's negligence cause of action

In *Fickett v. Superior Court of Pima County,* 27 Ariz. App. 793, 558 P.2d 988 (1976), this division of the Arizona Appellate Court adopted a test that was first announced in *Biakanja v. Irving,* 49 Cal.2d 647, 320 P.2d 16 (1958), which defines the class of persons to whom an attorney owes a duty of care. This test balances various factors, including foreseeability of harm to that person, degree of certainty of his injury, intention to affect that person, moral blameworthiness of the attorney's conduct, and the connection between this conduct and the injuries suffered. Application of the *Fickett-Biakanja* test to the case at bar leads to the conclusion that respondents owed a duty of care to appellant that included refraining from suing him under the circumstances. The *Chalpin* and *Lewis* cases were both decided by Division 1 of this Court in Departments A and B, respectively. See *Chalpin v. Brennan,* 114 Ariz. 124, 559 P.2d 680 (1979) and *Lewis v. Swenson,* ..... Ariz. ....., 617 P.2d 69 (1980). Respondents cite these opinions in support of their position that an attorney cannot be liable on a negligence theory to a third party not in privity. Neither court in either of those cases applied the *Fickett* test. *Lewis* cited the *Fickett* opinion but made its decision

on other policy grounds. *Fickett* makes it clear that an attorney can be held liable to persons other than those with whom he is in privity of contract.

> "We cannot agree with petitioners that they owed no duty to the ward and that her conservator could not maintain an action because of lack of privity of contract."
>
> • • • • •
>
> "We believe that the public policy of this state permits the imposition of a duty under the circumstances presented here." *Fickett v. Superior Court,* 27 Ariz. App. 793, 558 P.2d 988 at 989 and 990

Since respondents' concern over the chilling effect of exposing attorneys to countersuits within the original action has not discouraged the Tennessee and Washington legislatures, as noted above, this Court should follow its earlier rule announced in *Fickett* and not be influenced by the illusory and unsubstantiated concerns of respondents.

Adherence to a strict rule that counsel can never be liable in negligence to an opposing party would undoubtedly be more administratively convenient for the courts. But the *Fickett-Biakanja* balancing test would insure that innocent individuals such as appellant would be afforded just as much protection under our legal system as are respondents.

VI

The record contains evidence of triable issues of fact that Respondents had an ulterior motive in suing Appellant and that Respondents performed a willful act not authorized by legal process

Respondents and Appellant are in agreement that the elements of abuse of process are (1) an ulterior purpose in instituting the legal process; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Joseph, M.D. v. Markovitz, M.D.*, 27 Ariz.App. 122, 551 P.2d 571 (1976). Respondents assert that instituting a claim for the purpose of forcing a settlement cannot constitute an abuse of process, to which appellant is in agreement. However, the purpose of respondents was not to acquire settlement on the merits, but rather to force several defendants to pool their funds and pay plaintiff his demand rather than undergo the expense of vindication by trial. Evidence of this ulterior, improper purpose is expressed in appellant's Opening Brief. Consequently, summary judgment was improper and appellant is entitled to have these facts tried by a jury.

CONCLUSION

For the foregoing reasons, and those reasons discussed in appellant's Opening Brief, it is respectfully requested that this Court reverse the judgment entered April 17, 1980, remand all counts of the action to the trial court for trial by jury, instruct the trial court to allow expert testimony on the reasonableness of defendants' investigation and research, and allow the factual underpinnings of probable cause to be decided by the jury.

Dated: Dec. 31, 1980.

Maurer, Higginbotham & Harris

By /s/

Charles D. Maurer, Jr.
Attorneys for Appellant

CERTIFICATION OF SERVICE

Charles D. Maurer, Jr., hereby certifies that he caused to be delivered two (2) copies of the Replying Brief of Appellant in this proceeding on the 5th day of Jan., 1981, to the following:

Richard Briney
Suite 711,
Transamerica Building
Tucson, Arizona 85701

Dated this 5th day of Jan., 1981.

Maurer, Higginbotham & Harris

By /s/

Charles D. Maurer, Jr.
601 Montgomery Street,
Suite 511,
San Francisco, California 94111

Opposition

No. 81-178

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES W. BIRD, A.I.A.,
Petitioner,

VS.

SAMUEL ROTHMAN, JAMES M. ELLIOTT, THE LAW OFFICES OF SAMUEL ROTHMAN AND JAMES M. ELLIOTT, and DOES 1 Through 10,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

RICHARD BRINEY
FISH, BRINEY, DUFFIELD, MILLER, YOUNG & ADAMSON, P.C.
711 Transamerica Building
Tucson, Arizona 85701
Telephone: (602) 792-1181
Counsel for Respondents

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Summary of Argument	1
Argument	2
Substantial Federal Question Not Presented	2
Equal Protection Not Denied	4
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases	Pages
Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S. Ct. 955, reh. den. 370 U.S. 965, 8 L.Ed.2d 834, 82 S. Ct. 1575	3, 5
Berlin v. Nathan (1978), 64 Ill. App.3d 940, 21 Ill. Dec. 682, 381 N.E.2d 1376, cert. den. 444 U.S. 828, reh. den. 444 U.S. 974	3
Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 503, 90 S. Ct. 1153	4
Dohany v. Rogers, 281 U.S. 362, 74 L.Ed. 904, 50 S. Ct. 299, 68 A.L.R. 434	4
Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744	5
Lewis v. Swenson, 126 Ariz. 561, 617 P.2d 69	3
Missouri P. R. Co. v. Larabee, 234 U.S. 459, 58 L.Ed. 1398, 1408, 34 S. Ct. 979	4
Constitution	
Fourteenth Amendment, Constitution of the United States	4
Statute	
Arizona Revised Statutes, §§ 12-567	5
Other Authorities	
Supreme Court Rules of 1980, Rule 17.1, Rule 21(h)	3

No. 81-178

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES W. BIRD, A.I.A.,
Petitioner,

vs.

SAMUEL ROTHMAN, JAMES M. ELLIOTT, THE LAW OFFICES OF SAMUEL ROTHMAN AND JAMES M. ELLIOTT, and DOES 1 Through 10,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Samuel Rothman, James M. Elliott and the Law Offices of Samuel Rothman and James M. Elliott, by their attorneys respectfully submit their Brief in Opposition to the Petition for Writ of Certiorari filed in this Honorable Court on July 27, 1981.

SUMMARY OF ARGUMENT

The question of equal protection under the Fourteenth Amendment to the Constitution of the United States, not having been presented in a substantial manner to the Arizona Appellate Courts and not having been directly decided by said Courts, is not appropriately presented to this Honorable Court by the Petition for Writ of Certiorari.

The denial by the Arizona Courts of the right to maintain third party malpractice suits against attorneys does not constitute a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I

SUBSTANTIAL FEDERAL QUESTION NOT PRESENTED

The Petitioner has failed to demonstrate to this Honorable Court that the review he seeks by Certiorari of the Order of the Supreme Court of the State of Arizona, dated May 5, 1981, denying his Petition for Review, involves a substantial federal question. Neither case nor other authority is cited in the Petition supportive of the bare assertion by Petitioner that the equal protection clause of the Fourteenth Amendment to the United States Constitution requires a jury trial on his negligence claim against Respondents.

That the equal protection argument was largely makeweight is evidenced by the Opinion of the Court of Appeals, State of Arizona, Division Two, 2CA-CIV3763, filed March 19, 1981, which is copied at pages B-3 through B-12 of Appendix B to the Petition for Writ of Certiorari. Nowhere in the Opinion is the equal protection argument now advanced by Petitioner commented upon, excepting only in the Court's characterization of Petitioner's "preferential treatment" argument at page B-5, supra. This is understandable in light of the fact that Petitioner, in his Opening and Reply Briefs in the Court of Appeals, cited no authorities in support of his statements that he was denied "equal rights under law" (Petition for Writ of Certiorari, Appendix H, pages H-15 and 20; Appendix I, pages I-2 and I-8 and 10).

Similarly, Petitioner's Motion for Rehearing to the Court of Appeals, State of Arizona (Appendix C, pages C-1 through 12), fails to demonstrate a serious and considered presentation of the constitutional question. See page C-11, ibid. Rule 21(h) of the Supreme Court Rules of 1980 would seem to require more than this of Petitioner.

Tested by Rule 17.1, Supreme Court Rules, the instant Petition for Writ of Certiorari would seem not to meet the test that review on Writ of Certiorari "• • • . . . will be granted only when there are special and important reasons therefor." The discussion by this Honorable Court in *Beck v. Washington,* 369 U.S. 541, 8 L.Ed.2d 98, 82 S. Ct. 955, condemnatory of "mere generalized attacks" upon the holding of the Washington Court as to the equal protection question, would seem particularly relevant here. See 8 L.Ed.2d at 107, et seq.

Petitioner sees denial of equal protection under the Fourteenth Amendment in the rulings of the Arizona Courts that, while attorneys may be found liable to parties other than their own clients for malicious prosecution or abuse of process, public policy does not permit third-party malpractice claims against them. In its Opinion of March 19, 1981, the Arizona Court of Appeals had reference to the "overwhelming majority view in other jurisdictions" to that effect, together with the Arizona decision, *Lewis v. Swenson,* 126 Ariz. 561, 617 P.2d 69. (Appendix B, pages B-5 and B-6 of the Petition.)

It is of considerable interest that this Court denied certiorari and rehearing in the case of *Berlin v. Nathan* (1978), 64 Ill. App.3d 940, 21 Ill. Dec. 682, 381 N.E.2d 1376. See 444 U.S. 828, and 444 U.S. 974. In *Berlin,* perhaps the most widely publicized of the countersuit cases, the Illinois Appellate Court rejected the contention that an attorney

can be held liable in negligence to a party other than his client, saying:

> "• • • nevertheless we feel, as have the other courts which have considered the problem (see Annot. 84 A.L.R.3d 555, et seq.), that this, unfortunately, is the price which must necessarily be paid to keep the courts open to the people." Ibid, 381 N.E.2d at 1377.

II

EQUAL PROTECTION NOT DENIED

If it is true that in Arizona all professionals but attorneys can be subjected to negligence suits by third parties, consideration must be given to whether the classification (if it be such) meets the test of reasonableness, for it is only unreasonable and invidious classifications as to legal procedures and remedies that can be considered violative of equal protection of the laws. See *Dandridge v. Williams,* 397 U.S. 471, 25 L.Ed.2d 491, 503, 90 S. Ct. 1153. As this Court stated in *Missouri P. R. Co. v. Larabee,* 234 U.S. 459, 58 L.Ed. 1398, 1408, 34 S.Ct. 979:

> "But it is not open to controversy that the 14th Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and that its provisions therefore only restrain acts which so transcend the limits of clasifications as to cause them to conflict with the fundamental conceptions of just and equal legislation." 58 L.Ed. at 1408.

In *Dohany v. Rogers,* 281 U.S. 362, 74 L.Ed. 904, 50 S. Ct. 299, 68 A.L.R. 434, this Court emphasized that the equal protection clause does not exact uniformity of procedure, saying "The legislature may classify litigation and adopt one type of procedure for one class and a different type for another." Pointing out that ". . . the Fourteenth Amendment does not 'assure uniformity of judicial decisions • • • (or) immunity from judicial error • • •'", the Court, in

Beck v. Washington, supra (369 U.S. 541, 8 L.Ed.2d 98, 110, 82 S. Ct. 955, reh. den. 370 U.S. 965, 8 L.Ed.2d 834, 82 S. Ct. 1575), placed the burden of showing "essential unfairness" as a "demonstrable reality" upon the party claiming injustice.

The Arizona Supreme Court, in *Eastin v. Broomfield,* 116 Ariz. 576, 570 P.2d 744, had occasion to consider and discuss at some depth a contention that the Medical Liability Review Panel created by the Arizona legislature (A.R.S. §§ 12-567) denied equal protection of the laws to malpractice plaintiffs in requiring them to first submit their claims to a review panel. The Court, applying "the traditional equal protection test as expressed by the United States Supreme Court", rejected the contention, saying, in part:

> "We will uphold the classification if there exists any set of facts under which the classification rationally furthers a legitimate legislative purpose. *State v. Kelly,* 111 Ariz. 181, 526 P.2d 720 (1974), cert. denied 420 U.S. 935, 95 S. Ct. 1143, 43 L.Ed.2d 411 (1975); *Uhlmann v. Wren,* 97 Ariz. 366, 401 P.2d 113 (1965).
>
> • • •
>
> "The panel provision was one of the several provisions enacted by the Arizona legislature in an effort to curb rising medical malpractice insurance premiums. • • •
>
> "By providing a system whereby the meritorious claims could be separated from the frivolous ones prior to trial and pretrial settlements would be encouraged, the Act promoted a legitimate legislative purpose. See *Halpern v. Gozan,* 85 Misc.2d 753, 381 N.Y.S.2d 744 (1976).
>
> "We do not believe that the panel provisions violate the equal protection clause because the classification created by the Act has a rational basis." 570 P.2d at 751.

The principle and rationale of *Eastin* are equally applicable here.

The Arizona Court of Appeals, Division Two, in its Opinion of March 19, 1981 (Appendix B, page B-3 et seq.), as to which both Petition for Rehearing and Petition for Review to the Arizona Supreme Court were denied, made it abundantly clear, as it has been made clear in other jurisdictions across the country, that attorneys in carrying out their duties as advocates are in a class inherently different from the other professions as to which Petitioner seeks a comparison. The Court said:

> "Our Courts must be held open to litigating parties without fear of subsequent prosecution for calling upon the court to decide a contested issue. The lawyer's role in this process is unlike that of other professionals. His relationship with the opposing party is by its very nature adverse, not mutually beneficial. The party who is forced to defend a groundless lawsuit may institute disciplinary proceedings against the offending lawyer, as well as bringing a malicious prosecution action." Ibid, page B-7.

There being no irrational or invidious classification created by the decision of the Arizona Court of Appeals or the refusal of the Supreme Court of Arizona to accept review, no infringement upon the equal protection clause has been caused to occur.

CONCLUSION

On the basis of the foregoing authorities and considerations, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Richard Briney
Fish, Briney, Duffield, Miller,
Young & Adamson, P.C.
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-fourth day of August, 1981, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Charles D. Maurer, Jr., Law Offices of Maurer, Higginbotham & Harris, 601 Montgomery Street, Suite 511, San Francisco, California 94111, Counsel for Petitioner. I further certify that all parties required to be served have been served.

RICHARD BRINEY
FISH, BRINEY, DUFFIELD, MILLER,
YOUNG & ADAMSON, P.C.
711 Transamerica Building
Tucson, Arizona 85701
Counsel for Respondents